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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 40–96) is reported at 237 F. 2d 796.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1956 (R. 97). An order by Mr. Justice Harlan was entered on October 9, 1956, extending the time for filing the petition for a writ of certiorari to and including November 17, 1956 (R. 98). At the same time (October 9, 1956) Mr. Justice Harlan granted petitioner's application for bail. The petition for a writ of certiorari was filed on Novem-

ber 16, 1956, and was granted on January 14, 1957 (R. 98–99). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Court has limited the grant of certiorari to the following three questions presented by the petitioner (352 U. S. 964):

> 1. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?
>
> 2. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?
>
> 3. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?

STATUTE INVOLVED

18 U. S. C. 1461 as it read at the time the crimes charged were alleged to have been committed provided:[1]

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

[1] The 1955 amendment to the statute, c. 190 §§ 1, 2, 69 Stat. 183, deleted the fifth paragraph and changed the first paragraph to read as follows:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and——."

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and

shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

STATEMENT

Petitioner was charged in a 26-count indictment for the mailing of obscene, indecent and filthy matter in violation of 18 U. S. C. 1461, and for conspiracy to violate said section (R. 2–21). During the course of the trial, held in the United States District Court for the Southern District of New York, the conspiracy count was dropped (count 26), as were counts 12 and 25, and the case went to the jury on 23 counts, (R. 1).

In sending the case to the jury, the trial judge charged that in order for petitioner to be found guilty of violating 18 U. S. C. 1461, the material placed in the mail (R. 25) "must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall," and further that "[t]he test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community." (R. 26). He further

charged that the "books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion." (R. 26). He made it clear that the jury was to "judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by presentsday standards." (R. 26).

The jury returned a verdict convicting petitioner on four counts (10, 13, 17, 24) (R. 1). Count 10 involved Exhibit 2, which was a circular advertising, among other items, *Photo and Body, Good Times*, Volume 1, No. 10 (R. 9–10). Count 13 involved Exhibit 4, which included, among other advertisements, a circular advertising *Good Times*, Volume 1, *No.* 8 (R. 12). Count 17 involved Exhibit 11, which was a circular advertising, among other publications, *American Aphrodite Number Thirteen* and *Good Times*, Volume 1, *No.* 5 (R. 14–15). Count 24 involved Exhibits 7, 8, 9 and 10. Exhibit 7 was a form, Exhibits 8 and 9 were advertising circulars, and Exhibit 10 was a book entitled *American Aphrodite*, Volume 1, No. 3 (R. 18–19).[2]

On February 7, 1956, petitioner was sentenced to five years imprisonment and fined $5,000 on count 10 (R. 1-2). On counts 13, 17 and 24, petitioner was sentenced to five years imprisonment and fined $1 on each count (R. 1–2). The prison sentences on all counts

[2] Exhibits relating to the counts on which petitioner stands convicted have been filed with the Clerk.

were made to run concurrently and the $1 fines on counts 13, 17 and 24 were remitted (R. 1–2).

On appeal, the conviction was affirmed by the Court of Appeals for the Second Circuit (R. 97) upon a finding of clear evidence of obscenity (R. 40–96).

SUMMARY OF ARGUMENT

I

A. The free speech and freedom of the press rights, which are protected by the First Amendment are not absolute rights. There are competing interests of society which must be considered. The problem in each case is to weigh the value of the speech which is restrained, the interest of society served by the restriction, and the form of the restraint imposed.

B. Obscene publications have a negligible social value. They contain next to nothing in the way of ideas, information or opinions.

1. Historically it is apparent that obscene speech was not considered to be within the scope of the First Amendment's protection. Contemporaneously to the adoption of the Bill of Rights there were vigorous restraints on profanity and related forms of speech. These restraints, many of which would now not be upheld, convincingly demonstrate that absolute freedom of speech was not what the founding fathers had in mind, at least where the interest in public morality was at stake.

2. The decisions of this Court indicate that certain kinds of speech, such as opinions in the realm of politics, economics and religion, have a greater social value than other kinds, such as commercial circulars.

At the bottom of such a scale of values appears such speech as libel, epithets, and obscenity.

3. The obscene material which cannot be mailed under Section 1461 is limited to that material which is "calculated to corrupt and debauch the minds and morals" of the average member of the community. The charge to the jury properly construed the statute as applying only to such material.

The bulk of the material made non-mailable by this section is commercial pornography of the most vile sort. The appellate cases deal only with the occasional book of possible literary merit which is concentrated on explicit discussion of sex in terms not tolerated by the community; these cases give no fair guide to the basic problem—"hard-core" pornography—at which the statute is directed. Also caught by Section 1461 is an occasional product of the borderline operator, who is catering to the erotic interest but hopes that his material is not so bad that a jury will convict.

Together, such books and borderline entertainment material constitute less than 10 percent of the convictions under Section 1461 dealing with published material. Over 90 percent of such convictions under the statute are for the mailing of material which is "hard-core" pornography—commercially produced booklets and photographs dealing with every form of sexual perversion and activity known.

To restrain the circulation of obscenity does not prevent any idea from being discussed or circulated. No book is obscene because of the ideas it contains, but rather from the way in which the matter is

expressed. The rules of the Court barring scandalous matter from briefs, or the rules of public parks barring a man from speaking with his clothes off, do not prevent the discussion of any idea or the voicing of any opinion.

C. The public interest served by the restraint, the preservation of public morality, is of substantial importance to the community and would be seriously injured by the unrestricted circulation of obscene material through the mails.

1. Petitioner argues that the only public interest which can justify any restraint on absolute freedom of speech is the prevention of conduct to which the speech incites. There is substantial ground for believing that obscene material causes immoral conduct, but it is also clear that interests other than the prevention of conduct justify restraints. For example, such interests as the protection of the peace and quiet of the home from loud and raucous noise or from the interruptions of magazine peddlers have been held to justify reasonable restraints on speech and press.

2. As applicable to a case of this kind, the clear-and-present-danger test requires only that there be a showing that the social interest which is being served is in substantial danger of being injured unless the restriction is adopted. A solicitor at the door creates a clear and present danger of disturbing the privacy of the home. It is in this sense that such a test may be applied to the circumstances here.

3. The interest in the preservation of public morality has long been recognized by this Court, and long

regarded as an adequate basis for legislation. Legislation has ranged from controlling lotteries, preventing gambling, or keeping children off the streets, to preventing trains from running on Sundays. In each instance the interest in public morality has justified the restraint.

4. The distribution of obscene material would adversely affect this interest in public morality in several different ways. It would create an immediate risk of inciting to criminal or perverted sexual conduct. No one can establish the extent to which such conduct is caused, but the risk is certainly there. The distribution of the obscene which is, by hypothesis, likely to corrupt the morals of the average person, creates a substantial risk of breaking down the existing moral restraint and leading to prohibited conduct over a period of time. It is not necessary that a particular speech create a risk of an attempt to overthrow the government; it is enough if an unrestrained succession of speeches would do it. Similarly with obscenity, the cumulative effect of circulating material likely to corrupt morals creates a long-run risk of bad conduct.

Obscene material, like libel and epithets, also creates an immediate and direct psychological injury. Sending an obscene circular in the mail creates as great a risk of upsetting the recipient as calling him or her names. Further, the public has an interest in maintaining the privacy of the home free from invasion by pornography. The home is the central teacher of personal morals and spiritual values. Families have an interest in

maintaining the home and their private affairs free from debasement.

Moreover, public morality is an indivisible whole. One cannot safely corrupt that part dealing with sexual morality without adversely affecting the moral force which governs society in other ways. It is the moral force behind the laws, not the pieces of paper, which in fact is the constitutional framework of organized society. The breaking down of the respect for morality weakens the "morals" and the entire fabric of respect for law.

D. The restriction involved in Section 1461 is narrow and appropriate to its purpose. It does not involve the problems of administrative discretion or prior restraint. Here, there is no danger of abuse of administrative discretion or prohibiting the writing or publishing of any idea. If there is to be any restraint, it is well recognized that a criminal statute which provides for post-conduct punishment after trial by jury is the best possible form.

Section 1461 is a narrow restriction, applying only to obscene material and restricting its circulation only by one means, the United States mail. The United States has special rights over the postal service and may properly decide not to carry a certain category of material, deemed worthless at best, even if it could not restrict its distribution by other means. The narrowness of the restriction is demonstrated by the lack of alternatives.

E. In balancing the competing interests affected by the restraint, those interests must be given the value which they have to society. Changing views as to

what falls *within* the concept of obscenity must not be confused with the unchanging view with which society has regarded that which is obscene.

1. The competing interests involved in this case have been weighed by all institutions of organized society with the universal conclusion that obscenity must be restrained. Over 50 countries are parties to the International Agreement for the Suppression of the Circulation of Obscene Publications. The United Kingdom, which has been re-examining its obscenity laws, is now considering the adoption of a new statute which is remarkably similar to the American law. Every state in the Union except one has adopted legislation to restrain the publication and sale of obscene material. During a period of over one hundred years, running from 1842 to 1956, Congress has adopted some twenty laws dealing with restrictions on the importation or distribution of obscenity. This legislative judgment is entitled to great respect.

The courts, both state and federal, have considered such restraints as valid and have indicated the large social interest at stake in the preservation of public morality. This Court, time and again, has not only upheld the present statute and its predecessors but has used the recognized validity of this legislation as a starting point in upholding other statutes. From *Ex parte Jackson*, 96 U. S. 727, in 1877, to *Beauharnais v. Illinois*, 343 U. S. 250, in 1952, the Court has repeatedly based a decision on the premise that the United States could constitutionally restrain the distribution of obscene material. Recognized proponents of free speech, such as Professor Chafee, have also

concluded that the postal statute falls within the valid powers of Congress.

2. Variations as to what, at a given time, falls within the concept of obscenity reflect no change in the universal disfavor with which obscenity has been held. Within the United States the edges of obscenity have been melting, so that whatever idea content there may be that is restrained it is less than was restrained before. Today, when less falls within the concept of obscenity, there is less reason than ever before to allow material that is admittedly obscene to circulate through the mails.

II

There is no violation of the Fifth Amendment:

A. The postal obscenity statute is not so broad that it "burns down the house to roast the pig." On the contrary, it is narrowly limited to the evil at which it is directed and does not deprive petitioner of his liberty without due process of law. Unlike the statute involved in *Butler* v. *Michigan,* 352 U. S. 380, the federal statute restrains the circulation of only such material as is likely to corrupt the morals of the average member of the community—not the child or the particularly susceptible. Assuming the validity of the statute under the First Amendment, namely that Congress can restrain distribution to persons likely to be corrupted by the material, the only conceivable narrowing of the statute would be to except that minority not likely to be affected. But there is no way in which this minority can be identified. Some persons might not be susceptible to some obscenity but might to such pornography as the motion picture films of sex orgies. Further, Congress is not required by due process to make special exceptions for

the unusual individual. Also, a restriction applied to the mail may properly apply to all, since it is highly impractical to determine whether the addressee is susceptible or not, a distinction which might more easily be made in an over-the-counter transaction.

B. The standard laid down in the statute is not so vague or indefinite as to deprive petitioner of his liberty in violation of the Fifth Amendment. The common law background and years of judicial construction leave no one in doubt as to the central mass of material which is barred by the statute. The statute is primarily directed at dirt for dirt's sake—material which explicitly and purposefully deals with sex conduct in a degraded or perverted way with no compensating artistic aspect whatever.

In the nature of the problem it is impossible to have a precise and fixed boundary along which one can safely skirt with no risk of going over the line. Words and photographs do not lend themselves to any such sharp and certain distinctions. Publishers, such as petitioner, know not only the central mass of concededly obscene material but also know full well the shoal waters in which they sail. They know the interests to which they are catering. They wish to go as far as they can, and take their chances on a jury's verdict. When they get caught they cannot rightly say that the statute was so vague that they did not know what it meant.

The statutory standard is the best that has been devised. Taken with the clarification of judicial construction, there can be no doubt that it lies within the realm of legislative judgment. State statutes illus-

trate alternative forms of expression but fail to indicate that greater precision is possible. The Obscene Publications Bill now pending in Great Britain, after years of discussion, adopts a statutory standard remarkably like that which was given the jury in this case.

The statutory concept of obscenity meets the tests of definiteness laid down by the Court. It gives adequate notice and is at least as definite as other standards, such as reckless driving, which have been approved. The very standard here involved has not only been approved by the Court but used as a basis of decision in reaching conclusions as to other statutes.

III

Section 1461 has been challenged as infringing on unenumerated rights reserved to the people by the Ninth Amendment. The statute, however, is an exercise of the specifically delegated postal power. Unless the statute is prohibited by the First Amendment it thus lies within one of the delegated powers. Petitioner's argument would require the recognition of a special "right to be obscene" which is greater than the freedom of the press protected by the First Amendment and which, implicitly, subtracts from the delegated powers. There is neither authority nor reason behind such a proposition.

IV

Similarly, petitioner's arguments as to the Tenth Amendment must fall if he cannot prevail on the First. The full power over the postal service was

given to the United States; none was reserved to the states. That the United States may freely exercise its delegated postal and interstate commerce powers to regulate such generally local matters as lottery tickets and the transportation of women for immoral purposes is clear. Similarly, Congress may bar the use of the mails to obscene material unless it is prevented from doing so by the First Amendment. If Section 1461 does not violate the First Amendment, it does not violate the Tenth.

The decision as to what may legally pass through the United States mail is peculiarly a subject for unified regulation. The Court should not strain to find that a power was reserved to the states where the result would be to subject the content of the mails to different rules in every state through which they passed.

To hold Section 1461 invalid would not leave the states free to regulate obscenity, as petitioner suggests. The historical material to which he refers relates to the period prior to the adoption of the Fourteenth Amendment. This Court has made clear that the freedom of the press protected by the First Amendment is part of the liberty protected by the Fourteenth. If the content of obscene material is of such value that the United States must carry it through the mails, it is difficult to believe that the states could impose the greater restraint of restricting its publication or sale.

ARGUMENT

Under the limited grant of certiorari, the sole issue before the Court is the constitutionality of the

statute which makes it a criminal offense to mail "obscene, lewd, lascivious, or filthy" publications. There is not before the Court any question relating to the particular advertising circulars or other matter mailed by petitioner. Those exhibits were found obscene by the jury, the Court of Appeals affirmed, and this Court denied certiorari on that question. Pet. 2–3; 352 U. S. 964.

Other questions *not* before the Court are those arising from administrative exclusion of obscene matter from the mails. We are here concerned with the application of Section 1461 as a criminal statute which creates an offense of mailing obscene matter and authorizes punishment for such an offense after trial by jury.

Under the questions which the Court has agreed to review, it will consider the validity of Section 1461 on its face and as it has been construed. The Government adopts the construction placed on the statute by the trial court and confirmed by the Second Circuit. There are, of course, other instructions which would be equally within the statute—additional factors which the jury may be allowed to take into account—but the general scope of the statute is properly reflected in the charge below.

Section 1461 is here challenged on four separate constitutional grounds. The validity of the statute has been upheld so often that these attacks might be

dismissed on the basis of *stare decisis* alone. See *infra*, pp. 84–92. Because of the basic questions raised by Judge Frank's concurring opinion below (R. 48–96) and the limited grant of certiorari, we have assumed that the Court may wish to re-examine the merits of its prior decisions. This brief attempts to consider and weigh the competing interests involved. If errors have been made in the past—if freedom of the press has been unduly restrained—the Government has no interest in continuing that restriction. However, we believe that an examination of society's interests, as they are valued by society, overwhelmingly demonstrates the validity of the marginal restraint on publications which is imposed by Section 1461.

That this brief reargues the merits of the issues involved in no way lessens the weight which we believe should be given to the prior decisions of this Court. For over a hundred years, Congress has adopted restrictions on the circulation of obscene material in a series of statutes of which the most recent was enacted last year. Forty-seven states have adopted comparable restrictions. Time and again, this Court and others have upheld the validity of restrictions directed at such worthless, offensive, and damaging material. We believe these views are entitled to the greatest of weight. The Court cannot, if it would, approach this problem as a new question.

> courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. * * *

The rejection of absolute standards does not mean that the Court must look at each First Amendment case afresh and without guiding criteria. For the balancing of competing interests there is a framework of principle and standards of value developed in the prior decisions of this Court. These require the weighing of three basic factors:—the value of the kind of speech involved, the public interest served by the restriction, and the extent and form of the restraint imposed. We propose to examine the federal obscenity statute, 18 U. S. C. 1461, in the light of the standards developed in this Court's decisions.[5]

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[5] By this process of balancing interests, the Court has upheld certain federal restrictions on free speech in a large number of cases. *E. g., Schenck* v. *United States, supra; National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *Lorain Journal* v. *United States*, 342 U. S. 143, 155–156; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 94–104; *American Communications Assn.* v. *Douds, supra; Dennis* v. *United States, supra; United States* v. *Harriss, supra.*

The number of cases involving state restrictions is, of course, even larger. *E. g., Cox* v. *New Hampshire*, 312 U. S. 569; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Valentine* v. *Chrestensen*, 316 U. S. 52; *Prince* v. *Massachusetts*, 321 U. S. 158; *Feiner* v. *New York*, 340 U. S. 315; *Breard* v. *Alexandria*, 341 U. S. 622; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, 339 U. S. 460; *Teamsters Union* v. *Hanke*, 339 U. S. 470.

B. The value of the speech involved—Obscene publications have a negligible social value in the market place of ideas, opinions, and information

The value of obscene material must be judged against the purpose of the First Amendment. Historical study shows that the basic objective of that Amendment was to assure freedom of political comment and criticism of the Government. History also indicates that, at the time the Bill of Rights was adopted, speech such as profanity and obscenity was considered to be subject to legislative restriction. And by any measuring rod, ancient or modern, it is plain that obscene material has, at the most, no more than a negligible social utility. It clearly rates very low on the scale of values.

1. THE HISTORICAL PURPOSES OF THE FIRST AMENDMENT DID NOT INCLUDE PROTECTION OF THE OBSCENE.

(a) The social and political history of the era when the Constitution and the Bill of Rights were adopted shows indisputably that obscenity, profanity, and lewdness were strongly disfavored at that time, and considered unworthy of protection. The First Amendment could not have been designed to encourage or guard such speech. More rigorous restrictions than we now suggest were not considered to violate First Amendment freedoms by the community that adopted the Constitution and the Bill of Rights.

Profanity, for instance, was unanimously condemned at the time of the adoption of the First Amendment, and never thought to be immune from criminal sanction by the community. During the Revolutionary

War, the Continental Congress sought to stamp out the use of profanity by the armed forces:

> It being represented to Congress, that profaneness in general, and particularly cursing and swearing, shamefully prevails in the army of the united States, it is therefore, *Resolved*, That General Washington be informed of this; and that he be requested to take the most proper measures, in concert with his general officers, for reforming this abuse.[6]

The writings of Washington are replete with directives and orders to his troops condemning and outlawing profanity.[7] Moreover, though the majority of the states had free press provisions in their constitutions at the time of the adoption of the First Amendment [7a]

[6] Journals of The Continental Congress, vol. VII (February 1777), p. 157.

[7] "Purity of Morals being the only sure foundation of publick happiness in any Country and highly conducive to order, subordination and success in an Army, it will be well worthy the Emulation of Officers of every rank and Class to encourage it * * *; The wanton Practice of swearing has risen to a most disgusting height; A regard to decency should conspire, with a Sense of Morality to banish a vice productive of neither Advantage or Pleasure * * *". Writings of Washington, Oct. 1778–Jan. 1779, vol. 13, pp. 118–119 (General Orders, October 21, 1778). See, also, Writings of Washington, vol. 1, pp. 179, 382, 392, 396; vol. 3, p. 309; vol. 5, pp. 32, 367; vol. 8, p. 152; vol. 16, p. 13.

[7a] Article XVI of the Constitution of Massachusetts of 1780 provided: "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth." Of similar import see: Article 1, § 5, Constitution of Delaware (1792); Article IV, § 3, Constitution of Georgia (1789); Section 38 of the Declaration of Rights of the Constitution of Maryland (1776); Article 1, Section 22, Constitution of New Hampshire (1784); Article 15 of the

all the states condemned profanity. Thus, in Virginia the legislature that enacted the declaration "That the freedom of the press is one of our great bulwarks of liberty; and can never be restrained by despotick governments," did not think it inconsistent to direct that any soldiers or officers of Virginia suffer criminal penalty if guilty of profane "cursing or swearing".[7b]

William Rawle, the first of the commentators on the Constitution, pointed out that the right of a free press does not protect offensive publications.[8] All of the states had long-standing statutes directed against profane swearing as an offense against public morality.[9] The reported cases of the early period of our history held that profane expressions, offensive to public morality, were subject to criminal sanction and not within free speech or press protection. See, *e.g., The People* v. *Ruggles,* 8 Johns

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Declaration of Rights of the Constitution of North Carolina (1776); Article 12, Constitution of Pennsylvania (1776); Section 43 of the Constitution of South Carolina (1778); Chapter 1, Section XV, Constitution of Vermont (1786). Vermont was admitted to the Union on February 18, 1791. These provisions are collected in Poore, Constitutions and Charters (1878).

[7b] Journals of The Convention of Virginia, Ordinances of the Convention of July 1775 (1816 ed.), p. 39. The Declaration of Rights was passed one year later on June 17, 1776. See Rutland, *The Birth of the Bill of Rights* (1776–1791), 232.

[8] See, Antieau, *Judicial Delimitation of The First Amendment Freedoms*, 34 Marquette L. Rev. 57, 68.

[9] See *e. g.* 2 Swift, *Connecticut System of Laws* (1796), p. 327; *An Act For The Encouragement of Literature and Genius*, enacted in January 1783, Connecticut Statutes (1796) pp. 282–284; 2 Jones and Varick, *New York Laws* (1787–1789), pp. 257–258, adopted February 23, 1788; Iredell, *North Carolina Laws* (1791), adopted in 1741, p. 77; Virginia Compiled Laws (1776–1803) 2nd ed., p. 389, adopted December 26, 1792.

pointing out that the First Amendment protects materials of an entertainment value as well as ideas, noted that such materials are "equally subject to control if they are lewd, indecent, obscene or profane. *Ex parte Jackson,* 96 U. S. 727, 756; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568."

To Professor Chafee, the basic purpose of the free press provision of the First Amendment, as conceived by the drafters, was "to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions." [15] It is past dispute that the condemnation of the excesses of the English doctrine of seditious libel was the most important factor motivating the adoption of the First Amendment.[16] The Maryland ratifying convention proposed a free press amendment to the federal constitution on the ground that "[i]n prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right may prove

[15] Chafee, *Free Speech In the United States* (1941 ed.) 22. Yet even as to political speech the 18th Century community was not thinking in absolute terms. "The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1799 and 1803." Mr. Justice Frankfurter, concurring; *Dennis* v. *United States*, 341 U. S. 494, 517, 521.

[16] During the Constitutional convention itself, there was little debate concerning free press. Early in the convention, Charles Pinckney of South Carolina proposed a draft constitution prohibiting the passage of any law "* * * touching or abridging the liberty of the press: * * *". This proposal although reported to committee was apparently never acted upon. Later in the convention a similar proposal went to a vote but was defeated. 5 Elliot's Debates, 129–131, 445. See Patterson, *Free Speech and A Free Press* (1939 ed.), 116–117.

invaluable."[17] In Virginia, George Mason posed the following possibility if no free press provision was adopted.

> * * * Now, suppose oppressions should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press * * *.[18]

See also Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 569–570; 2 Schofield, *Constitutional Law and Equity* 515, 535.

The *affirmative* aims of the First Amendment—the converse of the negative aim to abolish seditious libel—were well put about a decade and a half before it was adopted in a letter to the inhabitants of Quebec, in 1774, by the Continental Congress:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiment on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or

[17] 2 Elliot's Debates 552.

[18] 3 Elliot's Debates 441–442.

I

The First Amendment

CONSIDERING THE WORTHLESSNESS OF THE SPEECH RESTRICTED, THE STRONG SOCIETAL INTEREST IN PUBLIC MORALITY AND THE EFFECT OF OBSCENE MATERIAL ON THAT MORALITY, AND THE FORM OF THE RESTRICTION INVOLVED—18 U. S. C. 1461, WHICH MAKES IT A CRIME TO MAIL OBSCENE MATTER, DOES NOT VIOLATE THE FREEDOM OF SPEECH OR FREEDOM OF THE PRESS GUARANTIES OF THE FIRST AMENDMENT

Petitioner's attack on the statute is simple and straightforward:—the First Amendment provides that Congress shall make *no* law abridging the freedom of speech or of the press; a statute that makes it a crime knowingly to deposit obscene matter in the United States mails imposes a restriction on the distribution of certain types of printed matter; such a restriction, petitioner says, necessarily abridges the freedom of the press because it has not been proved that the distribution of obscenity creates a clear and present danger of criminal conduct.

The Government's position, on the other hand, is that under the First Amendment there must be a weighing of competing interests; First Amendment freedoms are not questions of absolute rules and absolute exceptions. The Amendment is not a rigid rule against all regulation of speech or press but rather requires a weighing of relevant factors, including the type of speech involved, the reason for the restriction, and the method of restriction employed. On such a weighing, obscenity is seen to be clearly

subject to the criminal restriction imposed by 18 U. S. C. 1461.

A. Free speech and free press are not absolute rights constitutionally free from all restriction, but are subject to a balancing of relevant interests

There is, of course, no better settled principle of constitutional law than that the freedoms referred to in the First Amendment are not absolute, and that every appeal to that provision requires a weighing of relevant interests. As the Court put it recently in *Breard* v. *Alexandria*, 341 U. S. 622, 642:

> The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life [citations omitted].[3]

"No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values."[4] And the late Professor Chafee has commented (*Free Speech in the United States* (1941) 35):

> The true boundary line of the First Amendment can be fixed only when Congress and the

[3] See also, *e. g.*, *Schenck* v. *United States*, 249 U. S. 47, 52; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Pennekamp* v. *Florida*, 328 U. S. 331, 336; *American Communications Association* v. *Douds*, 339 U. S. 382, 399; *Dennis* v. *United States*, 341 U. S. 494, 508; *United States* v. *Harriss*, 347 U. S. 612, 625–626.

[4] Professor Paul Freund, as quoted in Justice Frankfurter's concurring opinion in *Dennis* v. *United States*, 341 U. S. 494, 517, 542–43.

(N. Y.) 290 (1811); *The State* v. *Chandler*, 2 Harr. (Del.) 553 (1837); cf. *Updegraph* v. *The Commonwealth*, 11 S. and R. (Pa.) 394 (1824). In short, the latter 18th Century would have been shocked by any contention that serious profanity was protected by the First Amendment.[10]

Similarly, calculated obscenity stood condemned as contrary to public morality. *The Commonwealth* v. *Sharpless, et al.*, 2 S. and R. (Pa.) 91, decided in Pennsylvania in 1815, imposed a criminal sanction for the commercial showing of an obscene painting. And in *Ruggles, supra*, an 1811 case dealing specifically with abusive and vile language, the court pointed up that profanity and obscenity are of the same cloth (*Ruggles, supra* at 294–295):

> Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; * * *.

Apparently the only other reported early case resulting in a conviction for the publication of an obscene book was in *Commonwealth* v. *Holmes*, 17 Mass. 336 (1821). But as early as 1711, Massachusetts had a statute in force punishing obscene publications.[11] A

[10] See generally, to the same effect, Schofield, 2 *Constitutional Law and Equity* (1921) 532; Cooley, *Constitutional Limitations* (7th ed. 1903) 674; 2 Bishop, *Criminal Law* (9th ed. 1923), Sections 74–84, pp. 53–61; Chafee, *Government and Mass Communications* (1947), vol. 1, pp. 54–56, 196–197; Zollman, *Religious Liberty in The American Law*, 17 Mich. L. Rev. 355, 457; Note, *The Legality of Atheism*, 31 Harv. L. Rev. 289.

[11] Vol. 1, Acts and Resolves of Massachusetts Bay (1692–1714), Section 19, p. 682. The same section punished profane swearing as well.

similar statute was enacted in Connecticut in 1834,[12] and in New Hampshire one was in force at least as early as 1842.[13] The absence of many reported cases, and statutory restrictions, is understandable when one considers that the vigors of frontier life and the lack of leisure was such that the "situation was not sufficiently acute for legislation."[14]

(b) We have discussed the revulsion against profanity and calculated obscenity by the society which adopted the First Amendment not only to indicate their objection to this type of expression, but to highlight that the free dissemination of such material was not within the general purpose of the Amendment. As this Court has phrased it, free press means "that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion * * *. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." *Thornhill* v. *Alabama*, 310 U. S. 88, 95. See also *Stromberg* v. *California*, 283 U. S. 359, 369; *Pennekamp* v. *Florida*, 328 U. S. 331, 346; *Thomas* v. *Collins*, 332 U. S. 516, 531. Cf *Winters* v. *New York*, 333 U. S. 507, 510, where the Court, in

[12] Connecticut Revised Statutes (1849), §§ 135–136. This statute also imposed a criminal sanction on profane swearing. (§ 132)

[13] Revised Statutes of New Hampshire (1842), c. 113, § 2, p. 221. The same section punished profanity.

[14] Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 36, 60. According to these writers, prosperity and leisure brought obscenity legislation.

> intimidated into more honorable and just modes of conducting affairs.[19]

In sum, the drafters sought protection of "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[20] But they did not seek to protect all speech—no matter how far removed from, or how little helpful to, the attainment of that objective. They did not place obscenity, lewdness, and profanity on the same plane as the political or social communication of ideas.

2. THE COURT'S DECISIONS INDICATE THE COMPARATIVE VALUE OF DIFFERENT KINDS OF SPEECH

Before turning to the "value" of obscenity, it may be worthwhile to suggest the comparative values of different kinds of speech as they have been worked out in the prior decisions of this Court on the basis of the purposes of the First Amendment. No rigid or arbitrary scale of values can be stated, of course, since much depends upon the circumstances, and there will be inevitable differences as to which, of two kinds of speech, should be placed higher on the list. But that there does exist some such comparative scale of value seems certain. The following is tendered as illustrative:[21]

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[19] Quoted in *Near* v. *Minnesota*, 283 U. S. 697, 717.

[20] Cooley, *Constitutional Limitations* (7th ed. 1903) 604.

[21] *Amicus curiae* Morris Ernst suggests that all speech can be divided into three categories: (1) ideas of sedition, (2) "merchandise words" (which promulgate ideas only to sell lottery tickets, stocks, bonds or other things), and (3) ideas for ideas' sake (Brief of Morris L. Ernst, *Amicus Curiae*,

political speech
religious
economic
scientific
general news and information
social and historical commentary
literature
art
entertainment
music
humor
commercial advertisements
gossip
comic books
epithets
libel
obscenity
profanity
commercial pornography

This Court has referred to the basic purpose of the First Amendment in many ways, but all point to the exchange of *ideas* in the political or economic realm. In *Stromberg* v. *California*, 283 U. S. 359, 369, the Court said:

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pp. 3–8). Although this analysis is helpful, in recognizing that different kinds of speech are accorded different kinds of protection, depending upon content, it is submitted that speech and press do not divide into any such nice compartments. It is not clear where speech advocating polygamy, for example, would fall, or how the difference between raucous sound truck activity and more reasonable speech is reflected in such an analysis. Also, it seems to us that the analysis begs the basic First Amendment question in this case, whether commercially-produced pornography is in "the sacred area" of ideas *qua* ideas which, Mr. Ernst states, the Constitution removes from the national governmental power.

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

In *Dennis* v. *United States,* 341 U. S. 494, 503, it was said that the basis of the First Amendment was the hypothesis that "free debate of ideas will result in the wisest governmental policies." And in *Thornhill* v. *Alabama,* 310 U. S. 88, 95, the Court explained the reasons behind freedom of speech and of the press in the following terms:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion * * *.

Economic speech, such as in picketing, also rates high (*Thornhill* v. *Alabama,* 310 U. S. 88), but may be more easily outweighed by competing considerations. *E. g., Teamsters Union* v. *Hanke,* 339 U. S. 470; *Hughes* v. *Superior Court,* 339 U. S. 460; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490; *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722.

Religious expression is one form of speech which is accorded particular protection where other forms of speech or press may not be. The national interest in religious freedom thus justifies the distribution of religious literature, despite the fact that it may litter the streets (*Schneider* v. *State*, 308 U. S. 147; *Murdock* v. *Pennsylvania*, 319 U. S. 105, and companion cases), whereas commercial circulars could be restricted for that reason (*Valentine* v. *Chrestensen*, 316 U. S. 52). Again, there may be greater freedom to use a sound-truck for religious expression (*Saia* v. *New York*, 334 U. S. 558) than for music (*Kovacs* v. *Cooper*, 336 U. S. 77).

Commercial speech, as indicated by *Valentine* v. *Chrestensen*, *supra*, rates substantially lower. Those members of the Court who have dissented from the Court's action in upholding certain restrictions have indicated that they would accord less protection to speech devoted to "selling pots" than that devoted to distributing magazines. *Breard* v. *Alexandria*, 341 U. S. 622, 650.

Near the bottom of the scale are epithets, and insults. A unanimous Court found that they were "no essential part of any exposition of ideas" and entitled to little consideration. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572.

Such a scale, indicated by the prior decisions of this Court, suggests the comparative social value in different categories of speech and press. Depending upon the content of the speech, a greater or lesser public interest may be required to justify a restriction.

3. THE OBSCENE MATERIAL MADE NON-MAILABLE BY SECTION 1461 HAS A NEGLIGIBLE SOCIAL VALUE

The issue of whether the particular material which formed the basis of petitioner's conviction is obscene or not is not before the Court, in view of the limited grant of certiorari. That material must be considered to be obscene, and the validity of the statute tested on that basis. Indeed, in view of the broad question as to the First Amendment which the Court has agreed to consider (*supra*, p. 2), it is believed that in considering the statute as against the First Amendment the Court should weigh the social value, if any, of all the material falling within the statutory definition of "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture * * * or other publication of an indecent character * * *." We discuss below, in connection with the Fifth Amendment (*infra*, pp. 95–113), the precision of this definition. We consider here the ideas and values of which society may be depriving itself if such obscene material is banned from the mail.

(a) *The statute as construed was limited to matter "calculated to corrupt and debauch the minds and morals"*

Before discussing the worth of the categories of material affected by the statute, it is well to consider the charge to the jury in this case. These instructions were comparable, we believe, to those usually given in cases under Section 1461.

In response to requests, the court instructed the jury that "the nude in and of itself is not obscene" (R. 29), that things that were "coarse" were not obscene, and that the "whole system, the whole Court

is not a censor" (R. 29). The essence of the charge on what constitutes obscenity was as follows (R. 25–26):

> The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts. The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. "Filthy" as used here must also relate to sexual matters. It is distinguishable from the term "obscene," which tends to promote lust and impure thoughts. "Filthy" pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion.
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by

present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

(b) The types of material made non-mailable by Section 1461

The abstract civil liberties issues of free speech and freedom of the press discussed by petitioner are seen in a new light when one examines the material actually caught in the net of the federal obscenity statute. The constitutionality of the statute cannot be considered without some understanding of the day-to-day problem with which it is dealing; the restraint cannot be weighed without knowing what is being restrained—what is the obscenity being sent through the mails.

We strongly urge that it would be a grave mistake to judge current obscenity by the cases which have reached the appellate courts, or which have been *causes célèbres* in the past. *"Ulysses"* and the *"Memoirs of Hecate County"* are not typical.[22] The typical piece of obscenity covered by the statute is far different from those works, far more indisputably pornographic. The validity of the statute must be judged by this mass of "hard core" pornography which, as we shall now show, is its main objective and its major catch.[23]

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[22] Of the 175 convictions for violation of Section 1461 during the fiscal year 1956, 166 defendants pleaded guilty.

[23] So that the Court and other counsel in this and the related cases may have a better understanding of the operation of the statute, the Government has filed, under seal, with the Clerk a substantial volume of material which came into the Government's possession under Section 1461. This represents a fair

The commercial obscene material which is made non-mailable by Section 1461 may be divided, roughly, into three categories.[24]

The first category is that which raises the most concern among authors, publishers, and others specially interested in civil liberties. These are novels of apparrently serious literary; intent, sometimes skillfully written. They are caught by Section 1461 because they concentrate on explicit discussion of sex conduct in a vocabulary based on four-letter words—and the like. Perhaps the most literary of these novels would be typified by Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*. There are not many such books. All together they probably constitute less than 2% of the items for which persons are convicted under Section 1461.

The second category of commercial obscene material which sometimes runs afoul of Section 1461 is in the borderline entertainment area. This material is produced by persons who operate quite openly, with fixed addresses, and known places of business. The bulk of it is in the form of magazines running from the slick to the pulp. These usually consist of cartoons, short stories, photographs, and drawings. The problem usually arises in connection with the photographs.

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sample of the pornography for which persons are convicted under Section 1461. It is estimated that 90% of the published or commercially reproduced material—that which might be called "press"—which is involved in convictions under Section 1461 is comparable to that filed.

[24] We omit personal, non-commercial, pornography—obscene private letters and postcards, individual or family photographs which are obscene, etc.—which is regularly sent through the mails.

Each magazine hopes to stay on the legally acceptable side of obscenity but is competing with others to be the most suggestive magazine available on the newsstand. To do so, models are posed in different degrees of undress and in increasingly provocative positions. There is an unlimited range of poses from the "arty" to the pornographic and it is impossible in the field of photographs to have a clear and sharp line between what is obscene and what is not (See *infra*, pp. 103–105). Although there will be close cases wherever the line is drawn, it is difficult to see a high social value or "idea" content in such photographs. The nudist magazines raise a similar problem of borderline cases.

Another kind of publication in the borderline entertainment area is the sort with which petitioner in this case has been associated over the years (Pet. Br. 5–6).[25] These are publications of individual works, or more usually selections or chapters from various writers, which have an erotic interest but may or may not be pornographic. Typically this may contain a collection including a work which, because of its age, might be called a "classic", some poetry, some pseudo-scientific discussion of sex habits, etc. Sometimes, such a book or magazine is so concentrated on explicit discussion of sex that, taken as a whole, it is found to be obscene. Such written material, however, would constitute a very minor percentage of the material

[25] Petitioner has also been concerned with the distribution of magazines and other materials, such as Wallet Nudes, French Nudes at Play, Stereoptic Nude Show, 2 Undraped Stars, Good Times, Chicago Sex-Dimensional Issue, Photo and Body, etc., all of which were found by the jury not to be obscene (R. 2–20).

for which persons are prosecuted under Section 1461. All told, this "borderline" category, consisting primarily of photographs, accounts for less than 10% of the seizures under the customs statute or the convictions under Section 1461.

The third, and by far the largest, category of all material which is made non-mailable by Section 1461 is the purposeful "black-market" or "hard core" pornography. This is commercially-produced material in obvious violation of present law. The distinction between this and the material produced by petitioner and others, as discussed above, is not based upon any difference in intent. Both seek to exploit the erotic market place. The difference is that the "black-market" traffickers make no pretense about the quality and nature of the material they are producing and offering. This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or "arty" terms. The production is plainly "hard core" pornography, of the most explicit variety, devoid of any disguise.

Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit, words of sexual excesses of every kind, over and over again. No one would

suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of "comic books", specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. The booklets "Nights of Horror" involved in *Kingsley Books, Inc.* v. *Brown,* No. 107, are described by the trial judge in that case (R. in No. 107, at pp. 52–54). These pamphlets, which run from 70 to 96 pages, are probably longer than most in circulation and perhaps somewhat more brutal than the average, but the judge's description accurately conveys the quality of this type of purposeful pornography. It may safely be said that most, if not all, of this type of booklets contain drawings not only of normal fornication but also of perversions of various kinds.

The worst of the "hard core" pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective.

Roughly 90% of the printed and photographic material supporting convictions under the Post Office statute are of this "hard core" type. Mr. Huntington Cairns, who has advised the Treasury Department

for over 23 years in connection with all seizures under its statute (19 U. S. C. 1305 (a)) (see Chafee, *Government and Mass Communications* (1947), Vol. 1, Chapter 12, pp. 242-275), estimates that "easily 90%" of all items seized by customs officials are "hard core" pornography. Certainly, this type of material would be sent freely and widely through the mails if it were not for the penalties of 18 U. S. C. 1461. Only legal prohibitions stop it now, and the absence of sanctions would open the gates wide.

(c) No idea of any value is denied a hearing by the barring of obscenity

The obscene material we have just described, which is now barred from the mails, does not, for the most part, contain "ideas" at all. With few exceptions it is produced solely for, and produces solely, an erotic effect. In fact, the only "idea" which could be said to be contained in "hard core" pornography is that there is pleasure in sexual gratification by any and every means, without regard to religious or moral teachings, legal prohibitions, the requirements of sound mental and physical health or the proprieties of a civilized society. Occasionally this is made explicit by a direct invitation to debauchery. The social value of such notions is, of course, nil. And to the extent that the "idea" is the advocacy of prohibited sexual conduct, such advocacy is entitled to no more protection than advocacy of polygamy, which the Court has held may be prohibited. *Davis* v. *Beason,* 133 U. S. 333, 342, see *infra,* p. 52.

Chafee has observed (*Government and Mass Communications*, Vol. 1 (1947), 56:)

> Profane and grossly indecent matter does not form an essential part of an exposition of ideas, and it has a very slight social value as a step toward truth. Those are the interests which we normally consider in advocating freedom of speech, but they play practically no part here. They are clearly outweighed by the social interest in the peace of mind of those who hear and see. Words of this type offer little opportunity for the usual process of counterargument.

Moreover, if there were any valuable ideas in the obscene material which is now denied the use of the mails, those ideas could be easily and freely communicated by wearing a different garb. In considering the value of the obscene material which is now restricted, one must take into account the ease with which any *ideas* that are now being limited could easily be circulated if the author chose a different form.

No idea, as such, will make a book or article obscene. We need not consider the ghosts of past censorship raised by appellant in No. 107 (Br. p. 78). Any subject—sexual or otherwise—can be appropriately discussed in detail, if communication of ideas is the object. The Kinsey books illustrate that ideas and comment on current sexual morals may be freely printed and freely circulated.[26] There may well be

[26] Open advocacy and incitement to incest or rape might be restricted, as is advocacy of murder, but not on the theory that the idea was obscene.

value in commenting on present moral or sexual standards and in helping society move toward better standards, in the never-ending search for improved social values. But these ideas can surely be conveyed without the use of obscenity. Those who believe that nudism or free love or some other panacea may be the cure to present tensions are free to say so, provided the ideas go abroad in decent dress. To stand naked on a soap box in a public square urging listeners to join a nudist colony is an exercise of free speech, but no invalid restraint is imposed if the speaker is required to put on a pair of pants.

The Rules and practice of this Court furnish an illustration of our thesis that ideas, whatever they are, can always be advanced with propriety. The Rules require that:

> Briefs must be * * * free from * * * scandalous matter. [Rule 40 (5).]

This may prevent counsel from shocking the Court in certain ways; it certainly would be construed as imposing a restriction on the vocabulary with which ideas might be advanced.[20a] But we suggest that it never occurred to the Court that this restriction would prevent counsel from advancing *ideas*, and the rule has had no such effect. We do not imply, of course, that Congress could automatically impose on everyone the same restrictions as the Court imposes on counsel, but we do suggest that, insofar as the communication

[20a] "Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners * * *" as quoted in Black's Law Dictionary (3d ed., 1933), p. 1583.

of *ideas* is concerned, the Court's practice shows that it can always be done in decent form.

C. The public interest served by the restriction—The preservation of public morality is of fundamental importance, and would be seriously affected by the distribution of the material made non-mailable by Section 1461

The second factor which must be weighed when considering a restraint upon speech or press is the public interest which that restraint serves.

Petitioner argues that the only speech which can be restrained is that which directly induces wrongful conduct. It is clear, however, under the decisions of this Court, that the public interest to be weighed against the interest of absolute free speech is not limited to the prevention of harmful *conduct* by the hearer or reader. The maintenance of public morality is of major interest to society and a proper basis for legislative action.

Moreover, if it is applicable to a conflict between the interest in the "ideas" circulated in obscene material and the interest in public morality, the clear-and-present-danger test requires only that there be a substantial possibility of harm to the latter interest. And the distribution of obscene material does create a serious risk of directly inducing criminal and perverted sex conduct. It also creates a serious risk of inducing such conduct over a period of time by breaking down the moral standards of the community. Also, like epithets or libel, the obscene material may itself cause direct psychological injury to individuals.

Finally, open flouting of the moral code of the community as to the circulating of pornography weakens the moral sanction behind other laws upon which, in the last analysis, they depend.

1. THE PUBLIC INTEREST WHICH MAY JUSTIFY A RESTRAINT ON FREE EXPRESSION IS NOT LIMITED TO THE PREVENTION OF CONDUCT

The keystone of petitioner's argument is that no speech can be restricted except that which induces illegal conduct by the hearer. Petitioner states (Pet. Br. 33–34):

> Consequently in order to sustain the instant obscenity statute, the government has the burden of demonstrating that allegedly obscene literature seriously and imminently causes wrongful action or conduct * * *

We believe, as discussed below (*infra*, pp. 54–60), that there is substantial ground for believing that distribution of obscene materials does contribute directly to immoral conduct, and certainly it creates a risk of doing so in a field where no one can be certain. But, in any event, petitioner is wrong in assuming that the only public interest which can justify a restriction on the press is the interest in suppressing criminal or harmful *conduct*. As this Court has shown, society has a great many interests which may justify restrictions on freedom of speech or of the press other than preventing wrongful conduct that might be induced by the speech.

In *Teamsters Union* v. *Hanke*, 339 U. S. 470, the Court held that peaceful picketing could be barred by a state where it conflicted with the state's policy of

encouraging small, self-employed businesses. There was no suggestion that the speech involved, which in effect urged persons not to patronize a particular store, would cause the potential patrons to engage in some "wrongful conduct", which the state could prohibit. On the contrary, the speech might persuade them to do something they were perfectly free to do—refuse to buy at the store. The damage was to a general social policy of the state to keep small, self-employed persons in business, a policy which is certainly less strongly held than views as to public morals.

In *Prince* v. *Massachusetts,* 321 U. S. 158, the public interest being weighed against unrestricted free speech was that of keeping children off the public streets. The Court held valid a state statute prohibiting a boy under 12 or a girl under the age of 18 from selling periodicals on the public streets even though the speech involved was religious in content. Here again, the restriction on the distribution of printed matter was justified not because the words involved incited to prohibited conduct but because the distribution itself conflicted with predominant social and moral interests of society.

The interest of society in the cleanliness of its streets is itself sufficient to justify a restriction on the distribution of printed matter where the content, such as that contained in a commercial handbill, is of no great value. *Valentine* v. *Chrestensen,* 316 U. S. 52. It is not that the commercial advertising will induce people to engage in conduct which may be prohibited. It is simply that such distribution of

printed matter of that type conflicts with the social interest in keeping the streets clean, and that society's interest in cleanliness is greater than in the distribution of printed matter which has no more social utility than a handbill explaining where the public may see a submarine. On the other hand, distribution of religious tracts may have to be permitted (*Schneider* v. *State*, 308 U. S. 147).

The interest of a town in the orderly and convenient use of its streets may justify a restraint on the manner and time in which the streets can be used for public expression of views. *Cox* v. *New Hampshire*, 312 U. S. 569. Despite the differing views expressed by members of the Court in *Kovacs* v. *Cooper*, 336 U. S. 77, on the scope of the Trenton, New Jersey, ordinance dealing with the use of sound trucks, there was unanimous agreement that a community's interest in quiet was sufficient to justify regulation of the time, place, and volume of the sound permitted.

In *American Communications Association* v. *Douds*, 339 U. S. 382, 397, 398, the Court reviewed some of the competing interests which justified restrictions on First Amendment rights:

> But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing

of imminent danger to the security of the Nation is an absurdity. * * *

On the contrary, however, the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), or of the whole community, *Jacobson* v. *Massachusetts;* 197 U. S. 11 (1905), and it may be offensive to the moral standards of the community, *Reynolds* v. *United States,* 98 U. S. 145 (1878); *Davis* v. *Beason,* 133 U. S. 333 (1890). And Government's obligation to provide an efficient public service, *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), and its interest in the character of members of the bar, *In re Summers,* 325 U. S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment. And see *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 499–501 (1949). We have never held that such free-

> doms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire, supra* at 574.

In referring to the "evils of conduct", the Court did not limit legislators to the conduct which the speech was urging, but also included conduct involved in the very exercise of the First Amendment rights, such as the use of a sound truck. In this context, the putting of pornography in the mail is the "conduct" which society may prevent if, on balance, the interests in prohibition outweigh those favoring free distribution. The public interest being served is not limited to the prevention of wrongful action on the part of those who receive the pornography through the mails.

2. THE CLEAR-AND-PRESENT-DANGER TEST, IF APPLICABLE HERE, REQUIRES ONLY THAT THERE BE A SUBSTANTIAL DANGER THAT A STRONG COMPETING SOCIAL INTEREST WILL BE INJURED UNLESS THE RESTRICTION IS IMPOSED

The Due Process clause requires that there be some reasonable relationship between legislation and the purpose which it was designed to serve. With regard to First Amendment freedoms, a more rigorous test has sometimes been demanded, which has generally been referred to as the standard of "clear and present danger". There is no need here to review the development of the doctrine nor what it has meant to

different individuals at different times. We do not here have political, religious, or economic speech with which the "clear and present danger" test has been associated. See, *e. g., Schenck* v. *United States,* 249 U. S. 47; *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357; *Dennis* v. *United States,* 341 U. S. 494.

For the purposes of non-political speech of a low order, like obscenity, what is involved is the comparative relationship between the speech or press that is restrained and the interest which will be injured if it is not limited. The social interest being served by the restraint must, of course, be substantial. Whether it be referred to by the phrase "clear and present danger" or not, the injury to that social interest must be probable and grave if the speech is not restrained. Where the competing social interest will obviously be directly affected, the Court has not usually spoken in terms of "clear and present danger", though the rulings can be phrased in those terms. Epithets can be said to create a clear and present danger of a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Passing out handbills creates a clear and present danger of littering the streets. *Valentine* v. *Christensen,* 316 U. S. 52. A loud and raucous sound truck creates a clear and present danger of disturbing the peace and quiet of a community. *Kovacs* v. *Cooper,* 336 U. S. 77. And a solicitor at the door creates a clear and present danger of disturbing the privacy of the home. *Breard* v. *Alexandria,* 341 U. S. 622.

The short of it is that the "clear and present danger" concept adds little to the consideration of

those non-political cases where there is a direct injury to an important social interest. In such a case, the true issues are only whether the competing public interest is a strong one and whether it will be injured unless the restriction is imposed.

3. THE PRESERVATION OF PUBLIC MORALITY IS OF MAJOR INTEREST TO THE COUNTRY AND A SOUND BASIS FOR LEGISLATION AGAINST OBSCENITY

The prime social interest violated by pornography, particularly commercial pornography, is the interest in maintaining public morality. The protection of public morality has pervaded state and federal action and has been time and again affirmed by this Court as a basis for legislative action.

In 1879, the Court validated a statute of Mississippi making lottery a crime. Chief Justice Waite wrote that "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." *Stone* v. *Mississippi*, 101 U. S. 814, 819. See also, for recognition that lotteries may be condemned by the state legislatures as a means of protecting public morals, *New Orleans* v. *Houston*, 119 U. S. 265; *Douglas* v. *Kentucky*, 168 U. S. 488. In *Booth* v. *Illinois*, 184 U. S. 425, the Court upheld a state statute forbidding contracts for options to buy grain at futures, on the ground that the Court has no authority to interfere unless the statute has no "real or substantial relation" to the protection of public morals. *Id.* at 429. A comparable limitation on business activity by the state, in protecting public morality, was upheld in *Otis* v. *Parker*, 187 U. S. 606, involving a California

statute invalidating contracts providing for the sale of shares of stock in any corporation, on margin, or to be turned over in the future. Authority to preclude gambling as inimical to public morality has also been affirmed. In *Marvin* v. *Trout*, 199 U. S. 212, involving an Ohio statute permitting any one to sue to recover money paid as a gambling debt, the Court recognized that gambling was generally regarded "as a vice to be prevented and suppressed in the interest of the public morals and the public welfare." 199 U. S. at 224. For similar approval of state authority to control and limit gambling techniques as a protection of public morals and welfare, see the *Trading Stamp Cases: Rast* v. *Van Deman & Lewis*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; *Pitney* v. *Washington*, 240 U. S. 387.

Again, the broad authority to foster and uphold public morality was recognized with respect to the liquor traffic. Early, a license requirement for the sale of spiritous liquors was sustained in the interest of the public welfare, in the absence of federal legislation. *License Cases*, 5 How. 504. Cf. *Bartemeyer* v. *Iowa*, 18 Wall. 129, sustaining a statute prohibiting the manufacture of intoxicating liquor for ordinary consumption. And for the principle that state authority concerning liquor prohibition derives from the police power of the states to protect public morality, see *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, 137 U. S. 86; *Crane* v. *Campbell*, 245 U. S. 304; *Samuels* v. *McCurdy*, 267 U. S. 188; see also *Van Oster* v. *Kansas*, 272 U. S. 465; *Eiger* v.

Garrity, 246 U. S. 97; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192. In *Murphy* v. *California*, 225 U. S. 623, 628–630, the Court upheld a California ordinance prohibiting, except in certain specified cases, the maintenance of any billiard hall or pool room. "Blue sky" laws have met with judicial approval as being a proper exercise of that authority of the states to protect their citizens from spurious business practices. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 551; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559; *Merrick* v. *Halsey and Co.*, 242 U. S. 568.

The close connection between concepts of public morality and governmental authority, illustrated by all of the foregoing cases, was graphically stated in *Trist* v. *Child*, 21 Wall. 441, 450:

> The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong.

This concept that government has, as one of its essential obligations, the preservation of public health and morality is not limited to the states, but has also been recognized as a duty residing in the federal government. The federal police power in the field of interstate commerce seeking to protect public morality has long been beyond dispute. In *Hoke* v. *United States,* 227 U. S. 308, the constitutionality of the White Slave Traffic Act, 36 Stat. 825, was upheld as within the commerce power of the federal government and as a definite means of upholding basic uniform concepts of public morality. And in *Caminetti* v *United States,* 242 U. S. 470, 491, the Court noted that:

> the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

See also *Champion* v. *Ames,* 188 U. S. 321, 355 (the lottery case).

In *Davis* v. *Beason,* 133 U. S. 333, 342, the validity of a statute of the territory of Idaho denying the franchise to any one who taught bigamy or polygamy was upheld against the challenge that it violated the freedom of religion and speech:

> It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. * * *

Similarly, in *Ex parte Jackson,* 96 U. S. 727, the Court sustained a statute prohibiting the use of the mails for lottery circulars, against a challenge relying

on the First Amendment, under the concept of public morality. See, in accord, *Public Clearing House* v. *Coyne,* 194 U. S. 497; *In re Rapier,* 143 U. S. 110. Cf. *Donaldson* v. *Read Magazine,* 333 U. S. 178, 191, where the unanimous Court, speaking through Mr. Justice Black, affirmed the *Coyne* case, *supra,* and observed:

> None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress to use the mails for perpetration of swindling schemes.[27]

4. PUBLIC MORALITY WOULD BE SERIOUSLY AFFECTED BY THE DISTRIBUTION OF OBSCENE MATERIAL

Against the negligible social value of obscene and pornographic material must be weighed that group of society's interests which are grouped together under the name of public morality. The major importance of these interests, taken collectively, cannot be doubted, and, as we have just shown, has been repeatedly confirmed by the Court. The question here is as to the ways in which these interests would be adversely affected by the distribution of the obscene material now barred from the mails by Section 1461. The answers to that question supply the themes for the following discussion.

[27] For a valuable discussion of the importance which public morality has played in the prior decisions of this Court and additional cases bearing on the point, see Whelan, *Censorship and the Constitutional Concept of Morality,* 43 Georgetown Law Review 547 (1955).

(a) The distribution of obscene material creates an increased risk of immediate criminal and immoral conduct

(i) As Judge Frank pointed out in his concurring opinion below, there are differences of views as to the extent of the influence which pornographic material may have in inducing criminal conduct. No one knows the extent to which rape and other sex crimes are caused by the limited pornographic material now available. Even less do we know the precise extent to which such crimes would be caused were existing governmental restrictions on the publication and distribution of such materials removed and were there easy access to the type of pornographic materials we have described above (*supra*, pp. 34–39). But there can be no question that *some* instances of criminal conduct have been a consequence of pornographic materials, and that their distribution does create a risk. Experts may differ as to the extent of the risk, or the precision of our knowledge, but that there is a risk is beyond dispute.

Petitioner seems to suggest that, unless the Government can prove fully that recipients of obscene material will probably put down the material and go out and commit a rape or other immoral act, then the material must be given unlimited circulation. But Congress is not confined to the narrow area of undisputed scientific proof by modern students. With an age-old problem like obscenity, Congress can draw upon historical experience, common knowledge and the views of those who deal with the problem day-by-day—at least until this common fund of knowledge and understanding is clearly proved to be without any founda-

tion (a conclusion which no one claims has yet been reached by any student).

Since sex conduct is caused by the reaction of a particular individual to a large mass of things to which he has been exposed, there cannot now be proof positive of the part that any one element played. All that can be done is to make an estimate as to whether pornographic material, turned loose in society, is likely to play a substantial part in bringing about illicit sex conduct. That estimate has been made, and it cannot be said to be unsupported.

In the first place, when one realizes that the bulk of the material banned from the mails as obscene is pure commercial pornography, illustrated with photographs and explicit drawings of all forms of sexual conduct and perversion, it would be surprising if it did not cause many of its recipients to experiment. The fact is that pornography is frequently shared, making it even more likely that two or more persons will be tempted into trying the various forms of immoral conduct that are described so glowingly and illustrated so profusely. In particular, the correlation between pornography and perversion is too close to believe that the first has no causal connection with the second.

At the Hearings before the House Committee on Post Office and Civil Service, 83d Congress, 2d Session on H. R. 569, "A Bill to Authorize the Postmaster General to Impound Mail in Certain Cases", Inspector Ray Blick of the Metropolitan Police Department, in the District of Columbia, testified to this close connection (Hearings, p. 22):

> Mr. JOHNSON. * * * Inspector Blick * * * whether in your mind there is a connection between this growth in pornography and obscenity, much of which materials come through the mails, according to your testimony, and the increase in sex crimes?
>
> Mr. BLICK. That is a hard question to answer for lots of reasons. We do not know what is in the mind of the individual who buys this material so the only way we could answer that would be that around 75 percent of the perverts, those that are taken into custody, where we are fortunate enough to get in their apartments, and in those cases it is nothing for us to seize from 1 to 20 books of pornographic material.

In the Report of the Select House Committee on Current Pornographic Materials, 82d Congress, 2d Session. (H. Rep. 2510), the police commissioner of Chicago was quoted as saying that the recent increase in sex and rape crimes was directly attributable to the influence of lurid magazines and comics. If he was referring to the non-pornographic material, pornography of the type we have described would appear to be an *a fortiori* case.

Donald S. Leonard, Chairman to the Conference of International Association of Chiefs of Police, reported to the Select House Committee referred to above (H. Rep. 2510, p. 114):

> The problem of obscene and pornographic writings, drawings, and photographs has been developing new proportions * * *. The effect has been that, their curiosity and excitement aroused, many have explored sex and indulged

> in its experiences with all the consequences that so often follow immoral conduct and promiscuity. The influence of salacious material upon vulnerable individuals is such that every effort should be made to impede and stop its circulation * * *

And J. Edgar Hoover has said:

> The increase in the number of sex crimes is due precisely to sex literature madly presented in certain magazines. Filthy literature is the great moral wrecker. It is creating criminals faster than jails can be built.[28]

Laymen also share in the general belief:

> And I may insert here that perhaps one reason for the city of Atlanta to become so aroused was the death of a little boy caused by one of the hideous sexual offenses believed to have been induced by the reading of obscene literature.[29]

Such opinions are not to be taken lightly. There is, at the very least, a substantial chance that they are right, and that increased distribution of pornography would cause increased perversion and other sex offenses, and increased illegitimacy. Congress, the various state legislatures, and the other countries of the world, have all acted on this substantial belief. It cannot be dismissed out of hand as invalid or incorrect. There is therefore adequate justification for

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[28] Quoted in Harpster, *Jurisprudence, Obscene Literature*, 34 Marquette Law Review 301, 302.

[29] Dr. Joseph M. Dawson, Executive Director, Joint Committee on Public Affairs for the Baptists of the United States, Hearings before the House Committee on Post Office and Civil Service, 83d Congress, 2d Session on H. R. 569, p. 8.

the view that the distribution of obscene material through the mail does create a substantial direct risk of immoral conduct. The present statute could be supported on this ground alone.

(ii) Both Judge Frank's opinion below and the briefs submitted in these cases for petitioner, appellants, and the various *amici curiae* refer to some sociological material discussing the causes of crime and delinquency. These are cited apparently to suggest that there is little danger in allowing pornography to be freely circulated. As pointed out above, Congress would not be required to accept the controversial views of these few students, but in any event an examination of their studies will show that they do not support the conclusion advanced in the opposing briefs.

That existing delinquency has not primarily been caused by pornography speaks as much for the effectiveness of the existing restraints as anything else. And most of the sociological discussion concerns comic books, television programs, crime stories, etc. None of it was directed, we believe, to the "hard-core" pornography with which the statute is principally concerned. No student or expert is cited to support the proposition that the distribution of this latter type of obscenity does not create a substantial risk of directly inducing prohibited sex conduct.

(iii) In this connection, it is pertinent to note that the problem of minors is particularly significant for a mail statute. It is possible to ascertain whether you are selling to a minor face-to-face, but not when sending out material through the mail. With the

mail, as with the public display of obscene material, it may be that adults must be deprived of the opportunity to see obscenity solely in order to protect children. See Section 143 of the Michigan Penal Code quoted in the footnote to the Court's opinion in *Butler* v. *Michigan*, 352 U. S. 380, 383, and referred to by the Court as a statute "specifically designed to protect * * * children against obscene matter". We discuss the general question of broadness in connection with the Fifth Amendment (*infra*, pp. 95–99), but, when considering the probable consequences of the circulation of obscenity through the mail, the effect on minors must be taken into account.

(b) The distribution of obscenity creates a substantial risk of inducing immoral sexual conduct over a period of time by breaking down the concept of morality as well as moral standards

Aside from the risk of immediate criminal conduct that is created by pornography, there is the long-run effect on conduct. That pornography could have only an eroding effect on the concept of morality and on moral standards is clear. A large portion of the pornographic material now seized in the mails consists of pictures and stories of fornication and abnormal sexual relations among persons who are not married. Typically, in such material a young woman or young man, or a girl or boy, who has been abiding by the moral code is held up to ridicule—and eventually joins in the "fun". Another common feature in such stories is that the girls must be overcome by force the first time, but once that has happened they will gladly engage in sexual relations with anybody.

The common circulation of such material could hardly help but induce many to believe that their moral code was out of date and that they should do what, they suppose, others are doing.

The conduct with which we are concerned need not be that which would immediately follow the reading of one book, the seeing of one pornographic moving picture, or the study of a set of photographs. Just as in the *Dennis* case, the feared conduct may be the result of repeated indoctrination. The charge to the jury in this case, and in the typical case under this statute, required a finding that the matter "must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall" (R. 25). The statute thus is designed to reach that obscene material which may not induce immediate conduct but which is likely to corrupt the morals. Once moral standards have been corrupted, one's conduct is no longer guided by them. It requires little judicial notice to know that one whose morals have been corrupted is likely to engage in sex conduct which society has a right to prohibit. In this slower but no less serious way, obscenity brings about immoral conduct.

(c) With obscene material, like libel and epithets, the words or pictures themselves cause a direct psychological injury

Pornographic material offends the vast bulk of the population. Whether or not the words and pictures involved may lead to future conduct, the arrival of an obscene circular through the mails upsets, offends, and causes unpleasant emotions in the minds of many of

those who would receive it. One of the interests of public morality is to protect residents from this offense and this direct psychological assault.

Certainly, pornography is as offensive to most people as epithets. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–2; *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310. The extent of the injury would depend, of course, upon the form of the obscenity and the manner in which it reached the house,[30] as well as upon the susceptibility of the recipient. One can easily imagine any number of emotionally harmful situations. The mails being as important and universally used as they are, it is plain that they furnish one of the easiest and most powerful means of inflicting such psychological injury; and such injury through the mails is particularly difficult for the recipient to guard against. As the Court has said in a not too dissimilar context, feelings may be engendered "that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education*, 347 U. S. 483, 494.

The interest in protecting the public from such offense is indubitably genuine and substantial. The harm cannot be dismissed by the suggestion that obscenity is in the realm of ideas, not conduct.

(d) The public has an interest in protecting the privacy of the home from invasion by pornography

There is also a comparable social interest in protecting the home and family against disturbance. "The

[30] 18 U. S. C. 1464 imposes criminal penalties for the utterance of "any obscene, indecent, or profane language by means of radio communication * * *"

police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs* v. *Cooper*, 336 U. S. 77, 83. The strong social interest in preserving the privacy of the home is so great that it may justify restrictions on the distribution of periodicals with a worth-while content entitled to First Amendment protection. *Breard* v. *Alexandria*, 341 U. S. 622. With the mails, as we have suggested, the problem is even more pressing. Although there may be difficulties, the homeowner can post a sign prohibiting the solicitor and inviting the guest. But the United States mails must come through. There is no practical way in which the homeowner can selectively prohibit the unwelcome material in the United States mail from that which is desired. If the homeowner is to receive any mail in his house, he must receive all matter on which the postage has been prepaid.

If there is a social interest against having the privacy of the home disturbed by the ringing of the doorbell, there is a like interest against having the home invaded by pornography. No doubt most families would prefer the occasional magazine solicitor to the daily risk that the mail to which all members have access would contain obscene circulars offering pornography for sale.

Young children as well as adolescents look at the mail; it is a practical impossibility to have parental censorship over all letters before they are read by others in the household, even assuming that there were no legitimate concern in protecting parents, young and old, from pornography. Advertisements may

be sent by first class mail[31] addressed directly to a child or other susceptible person.

As illustrated in this case, the advertising circulars are frequently worse than the promised obscenity. The counts on which petitioner was convicted primarily involved advertising circulars which the jury found to be obscene. The jury failed to convict as to publications which were advertised by the circulars.

The home into which such material would flow is the center of moral training. Within the home, parents try to bring up a family—imbue the children with moral standards by which to guide their lives, and instill in them spiritual values to control their actions and conduct not only during childhood but throughout their adult lives. It is onto this home ground which petitioner claims a constitutional right to inject his commercial obscenity—those publications which play up the illicit, the perverted and the immoral, and which a jury unanimously found would be likely to corrupt the morals of the average person in the community. Whatever restraints society may impose elsewhere, it must have the right to protect the moral training ground of its succeeding generations and to aid parents in keeping the home free from the forced invasion of agencies which will tend to destroy and subvert that training.

Congress has no greater constitutional power over privately owned and operated television stations than it has over the United States mail. Yet no one would suggest that society would constitutionally have to

[31] Circulars on which petitioner was convicted were sent by first class mail.

allow an exhibition on television of naked persons or of carnal intercourse, open to view by the whole family, including children and adolescents. There is clearly a special family interest in protecting the privacy of the home from the intrusion of obscenity, whether by television, by radio, or by the mail chute or letter box.

There is an even more personal family injury occasioned by crude and salacious pornography of the type which is now banned. As between a husband and wife in love there is nothing more special, and more full of wonder, than their intimate life together. With or without a religious significance, it has a high spiritual aspect. It is something above and apart, strong and overwhelming, yet at the same time delicate, precious, and private. Yet this is the subject which pornographers would illustrate and describe in the grossest and most disgusting form. It makes no difference that the photographs are of others, or that the advertising circulars received in the mail are thrown away. One's own privacy cannot withstand an onslaught calculated to debase and pervert in the public eye something so close to that which had been personal. It would be hard to remain unaffected. What was special would, at least for many, tend to become sordid.

(c) *Circulation of obscene material weakens the fundamental fabric of public morality*

One thrust of petitioner's argument appears to be that the general interest in sexual morality, specifically the moral interest against the distribution of obscenity, is not great—that this aspect of public

morality can be safely corrupted without harming the whole fabric. But public morality is more than a set of manners or even a code of unrelated rules. It is the element of "ought" that lies behind the laws and rules of an organized society. The collective public conscience pushes the individual in the direction of being honest, fair, law-abiding, and decent. While separate elements may sometimes be singled out, public morality is really indivisible, in the sense that one aspect of it cannot be corrupted and leave the rest unaffected.

We have discussed above the risks, which must be admitted, that circulation of pornography will lead, either directly or gradually, to immoral sexual conduct. But morality is more fundamental than rules as to sex conduct. The entire willingness of a society to be governed by rules—to do those things which it ought to do—depends upon a close correlation between those rules and the public conscience. The public morality of a nation may be compared with the morale of a fighting force. The willingness of one citizen to abide by the demands of those rules which apply to him depends upon his knowing that in general others are abiding by the community standards which govern what they ought to do. The man who finds that the Government will or can do nothing to stop the distribution of pornography to his family will be less willing to abide by society's demands on him, whether it be as to gambling, distribution of narcotics, or the candor with which he fills out his income tax. Similarly, the corruption of moral standards in the realm of sexual conduct cannot help but corrupt other aspects of moral life. Morality,

like morale, cannot be undercut at one point without affecting all conduct.

There is another factor which must also be taken into account. Public morality is not only the conscience of a country which ensures basic compliance with the laws and social standards of that society; it provides the very objectives for organized society. Governments are organized so that competing interests can be reconciled and those things which "ought" to be shall take place. The gap between the law and the public conscience can never be too great if that society is to continue to operate effectively. If the law is substantially more restrictive than the public conscience dictates, compliance with the law breaks down, with a contagious effect in other areas. On the other hand, if the law fails to provide rules or procedures to cope with a social problem about which people properly feel strongly, those groups which have the strongest views may take the law into their own hands.

There can be no doubt that the public feels strongly that pornography must not be circulated, and properly so. The existence of federal laws and laws in 47 states demonstrates a public concern.[32] The thousands of letters received each year by the Post Office complaining about obscene material currently circulated in the mail also testify to that concern.[32a] Few would doubt that the public feels more strongly about the production and distribution of pornography than it does

[32] Only New Mexico is without legislation directed against the dissemination of obscene material. See *infra*, p. 79.

[32a] As to a single publisher, such as petitioner or appellant in No. 61, the Post Office receives several thousand complaints.

about lotteries (*Ex parte Jackson*, 96 U. S. 727), pool rooms (*Murphy* v. *California*, 225 U. S. 623, 628–630), options to buy grain at futures (*Booth* v. *Illinois*, 184 U. S. 425), gambling (*Marvin* v. *Trout*, 199 U. S. 212), running trains on Sundays (*Hennington* v. *Georgia*, 163 U. S. 299), or many of the other aspects of public morality that have been the basis, at various times, for legislative action. This strong interest has become incorporated in the public conscience and is therefore, in and of itself, a valid reason why governmental power should be used to prohibit the distribution of pornography.

We do not suggest that the existing codes of morality cannot be attacked. They are attacked daily and, partly as a consequence, are everchanging. But the morality which holds society together is fundamental and basic. Morality must tolerate change but it need not tolerate moral anarchy. Those seeking to change the standards of public morality, like those seeking to change the Constitution, may freely do so. Those seeking to change the Constitution must use methods permitted by the Constitution. Those seeking to change the fundamental standards of public morality can similarly limit their forms of expression to those tolerated by present morality. As discussed above (*supra*, pp. 39–42), such a restriction imposes scarcely any restraint on the ideas or arguments which can be used in favor of a different public morality. As the able briefs of petitioner and appellants in these cases illustrate, one may make the strongest possible arguments for unlimited freedom for pornography without being obscene. The requirement that material sent through the mail not be obscene similarly imposes no

appreciable restraint on the arguments or thoughts which can be advanced in favor of different concepts of public morality.

D. The method of restriction—Criminal punishment for abuse of postal facilities is an appropriate limitation to accomplish the statutory purpose

The third factor which must be considered—along with the value of the speech and the public interest served by the restriction—is the method and form of the restraint imposed. We believe that the negligible value of pornography, when weighed against the public interests on the other side, would justify the most inclusive and rigorous of restraints. However, in this case we have to deal only with the criminal provisions of Section 1461 which are plainly appropriate.

1. THERE IS NO QUESTION OF ADMINISTRATIVE DISCRETION OR PRIOR RESTRAINT

This case does not involve the sometimes difficult issues of prior restraint or administrative discretion which arise when administrative agencies have to determine in advance whether certain speech shall be permitted. Rather, we are dealing solely with a criminal conviction pursuant to a statute which imposes criminal penalties for violation of the law for the distribution of particular materials of anti-social content through the mails. Petitioner was convicted upon a post-distribution prosecution before a jury which made the ultimate decision. There was no administrative decision or ruling. The materials upon which petitioner was convicted flowed freely through

the mails." It was only after their receipt that Section 1461 was brought into play as a criminal statute imposing the sanctions of the law upon petitioner for its violation.[33]

Judge Frank, below, suggested that a criminal statute actually imposes a prior restraint. He said: "Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive" (R. 84). He suggests that as "a result, each prosecutor becomes a literary censor (i. e., dictator) with immense unbridled power, a virtually uncontrolled discretion" (R. 85).

We believe that this does not accurately reflect the differences between pre-censorship and a conviction for past conduct. A prior restraint may be bad because of the risk of serious abuse. But where there is no restraint on what one can write or distribute, except that violations of certain standards will be

[33] Although the Post Office employs the standard set out in Section 1461 in the exercise of its administrative authority to determine what shall be permitted to flow through the mails, authority stems not only from that statute but from 39 U. S. C. 259a (see *e. g., Summerfield* v. *Tourlanes Publishing Co.*, 231 F. 2d 773 (C. A. D. C.), certiorari denied, 352 U. S. 912) and from the general authority of 5 U. S. C. 369 to "execute all laws relative to the Postal Service." See *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 416; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158. The administration of the obscenity standard by the Post Office is involved in *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564, reversed, May 31, 1956, rehearing en banc, September 25, 1956 (C. A. D. C.), decision pending, and in *One, Inc.*, v. *Olesen*, No. 15,139, decided February 27, 1957 (C. A. 9).

punished, there is no such possibility of abuse. A man cannot be convicted unless a jury of his peers unanimously agrees beyond a reasonable doubt that he has violated the statutory standard. Decisions are reached in the public eye. Any work can see the light of day. There is no appreciable risk that a work that is fairly on the accepted side of the legislative standard will be suppressed. To suggest that there is no difference between an administrative ruling preventing distribution and post-conduct punishment is to overlook one significant basis on which freedom of the press developed.

The difference between administrative discretion and a judicial decision, where a restraint on the distribution of books is concerned, was one of the key points in the debate on Section 305 of the Tariff Act of 1930, and was emphasized by Senator Black:

> If that literature is contrary to the public sentiment of the States, the individual who brings it into that State can be tried and the jury will convict him. I have no hesitancy in saying that the jury should convict him when literature is so obscene as to be contrary to good morals and decent society. I do say, however, that until he stands and faces a jury of his peers no individual servant of this country ought to be given sufficient power to take away a single leaf or page from his book, nor to put him to one penny's expense.
>
> * * * * *
>
> * * * I am unalterably against any attempt to prevent the distribution of literature so long as the juries in the States, where public sentiment is made, have it within their power to

condemn the distribution of that literature as being deleterious to the morals of their people. [71 Cong. Rec. 4469.]

I would have no objection to this man reporting it to the courts; but in the case of a book which may or may not be bad I do strenuously object to having any customs inspector determine for the public what shall be distributed. Let it be determined by a court.

* * * * *

Oh, I have seen some of them that were printed in this country that would shock the morals of a man who has not been in church for 40 years. There is no question about there being bad books in this country, and bad books that come into the country. * * * The courts provide methods for the prosecution of all cases. This is purely a difference in the method of enforcement of law.

* * * * *

I agree with the Senator that the bad books should not be circulated; but I have an inherent opposition—I presume it comes, perhaps, from reading a great deal of Thomas Jefferson's philosophy—I have an inherent, well-grounded opposition against vesting in the hands of an individual judicial powers on matters of supreme importance with reference to the dissemination of human knowledge. * * *

* * * * *

I want to say this: If the Senator will devise some plan whereby this matter can be determined at the port on some kind of judicial inquiry, I shall be heartily in favor of it.

* * * * *

> So far as I am concerned I prefer to have the rights of American citizens, or people who are here, tried in the courts set apart and dedicated for that purpose, and then make it a crime and impose a punishment for importing indecent books; but do not have the thing tested by a deputy constable, or a deputy sheriff, or a deputy inspector. [72 Cong. Rec. 5418, 5419.]

2. SECTION 1461, WHICH IS APPLICABLE ONLY TO THE CIRCULATION OF OBSCENE MATERIAL THROUGH THE UNITED STATES MAIL, IS NOT TOO BROAD A RESTRAINT TO ACCOMPLISH ITS PURPOSE

Section 1461 cannot be condemned as being broader than its purpose. Its aim is to catch all obscene material that is likely to corrupt the morals of those who receive it. The statute, as drafted and construed, applies only to that class of material, and to none else.

Moreover, the statute does not impose a blanket restraint on all publication or circulation but is limited to that material which is sent through the United States mail. The postal service, particularly the second class mail into which most magazines fall, is a highly subsidized enterprise. Although to say that "the use of the mails is a privilege which may be extended or withheld *on any grounds whatsoever*" would raise grave constitutional questions (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, emphasis added), there can be no doubt that Congress has greater freedom to impose restrictions on what is carried in the mail than it may have in other areas. In *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 411, the Court referred to Congress' power over the mail as "practically plenary", citing *Ex parte Jackson*, 96 U. S. 727; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506,

507; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 313. The dissents in that case by Mr. Justice Brandeis and Mr. Justice Holmes did not question the power of Congress to exclude particular material from the mail, but only whether the postmaster, under the statute, could deny second-class mailing privileges to a newspaper because it had previously printed non-mailable matter. In fact, Mr. Justice Brandeis, in support of his argument, referred four times to the power of Congress to exclude obscene and immoral material from the mail. 255 U. S. at 418, 421, 422, and 430. At the latter point he said:

> * * * The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails.

The power of Congress over the mail was specifically recognized in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146. Speaking for a unanimous Court, Mr. Justice Douglas pointed out that the Court had already held—

> that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. [327 U. S. at 155–156.]

and that—

> When Congress has been concerned with the content of matter passing through the mails,

> it has enacted criminal statutes making, for example, obscene material * * * nonmailable in any class. [327 U. S. at 156.]

and again—

> The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. [327 U. S. at 158.]

Access to the mails, and particularly access to the subsidized second class category, is thus somewhere between a right and a privilege. Congress may exclude matter for a good reason if done on a nondiscriminatory basis. Making obscene matter nonmailable is thus not a broad across-the-board restriction but more in the nature of closing a particular, if valuable, avenue of circulation.

There are, to be sure, other federal statutes restricting the distribution of obscene matter in the United States. Such matter may not be imported into the United States or deposited (or taken from) any common carrier for carriage in interstate commerce (18 U. S. C. 1462), or transported in interstate or foreign commerce for the purpose of sale or distribution (18 U. S. C. (Supp. III) 1465). Neither may obscene language be used on any means of radio communication (18 U. S. C. 1464). Each statute must, of course, be considered by itself. The only issue involved in this case is, as stated in the questions on which the Court granted certiorari (*supra*, p. 2), the validity of the provisions of Section 1461 relating to the use of the mails for the circulation of obscene matter.

But even considering the cumulative effect of the different federal statutes, they are not unduly broad since they do not catch anything except obscenity—the precise matter which is within the purpose of the legislation. Further, they do not prevent self-expression or the creation of works of "art" no matter how obscene. The laws limit distribution and circulation, most of which is commercial in nature.

The narrowness of the federal statute must also be judged by the availability of alternative forms of restriction. We deal below (*infra*, pp. 95–113) with the charges of broadness and vagueness under the Fifth Amendment. At this point, we may merely state that no one has suggested narrower restrictions which could accomplish the purpose of Congress. The restriction obviously could not be applied only to certain classes of mail, or only to mail going to certain areas. There is no known way in which the restriction could be applied only to those who are susceptible or addicted to pornography; there is no way of telling in advance who such people are. Society surely does not have to wait until someone has become an addict, been corrupted by the material, in order to lock the gates. And even such a restriction would not meet petitioner's argument since he contends that he is communicating "ideas". Certainly, if this is the justification, it would not help to bar the material from all of those to whom the "ideas" would appeal.

In sum, the restrictions imposed by Section 1461 are narrow; they involve no administrative discretion or prior restraint. The form of the restriction argues strongly in favor of its validity.

E. The weighing of the competing interests, in the light of the values which organized society places upon them, overwhelmingly demonstrates that the social interests served justify the limited restraint upon freedom of the press involved in Section 1461

We have shown above that the content of the speech or press which is restrained is of negligible interest on any scale of comparative value. On the other hand, the numerous social interests summed up in the concept of public morality are of basic importance in the control of conduct, in the protection of privacy, and in the maintenance of the moral respect for law. The restraint imposed by Section 1461 is fully appropriate if these larger social interests are to be served.

We believe that, even if the Court were to judge these competing social interests in the abstract and on the basis of individual judgment, there should be no question but that the statute meets the requirements of the First Amendment. Men's minds and emotions are as much a subject of injury as their bodies, and the risks of injury involved in the distribution of pamphlets on the "joys" of sexual orgies is certainly as great as that of the possible fist-fight justifying the restraint in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

But the Court need not, in fact should not, judge these competing interests in the abstract or solely for itself. Society's interests should be weighed in the light of the comparative value which organized and enlightened society places upon them. This Court must hold the balance and weigh the interests. But the comparative weight which it accords to the interest on

each side of the scale should be appraised in the light of the weight which society gives that interest. And the question of the changing content *within* the concept of obscenity—an issue which is not here at this time—must not be confused with any change in the position which the concept of obscenity has itself held in this or any other society.

1. THE COMPETING INTERESTS HERE INVOLVED HAVE BEEN REPEATEDLY WEIGHED AGAINST EACH OTHER BY THE PUBLIC, STATE LEGISLATURES, CONGRESS AND THE COURTS, WITH THE UNIVERSAL CONCLUSION THAT SEVERE RESTRICTIONS ON OBSCENITY ARE REQUIRED

The competing interests which the Court must weigh have been weighed before. The grant of certiorari in this case must be taken as a decision to reexamine the constitutionality of a statute which has long been assumed. But that decision does not undercut the relevance of the statute itself or of the prior expressions of this Court as indicating the comparative values placed on the interests here at stake. Those views, like those of the states and of foreign governments, are relevant to an appraisal of social values.

(a) All countries restrict obscenity

The universally low value with which obscene material is regarded is perhaps shown no more clearly than in the single statistics of the number of countries which have agreed on joint action to restrain the circulation of obscene material. The International Agreement for the Suppression of the Circulation of Obscene Publications was signed at Paris on May 4, 1910. It entered into force for the United States

on September 15, 1911. 37 Stat. 1511.[34] The following states have become parties to that agreement (Treaties in Force, October 31, 1956, page 209, U. S. Dept. of State.):

Afghanistan
Albania
Australia
Austria
Belgium
Brazil
Bulgaria
Burma
Canada
China
Colombia
Cuba
Czechoslovakia
Denmark
Egypt
El Salvador
Estonia
Finland
France
Germany
Greece
Guatemala
Haiti
Hungary
Iceland
India
Iran
Iraq
Ireland
Italy
Japan
Latvia
Luxembourg
Mexico
Monaco
Morocco
Netherlands
Newfoundland
New Zealand
Norway
Paraguay
Poland
Portugal
Rumania
San Marino
Spain
Switzerland
Thailand
Turkey
Union of South Africa
Union of Soviet Socialist Republics
United Kingdom
United States
Yugoslavia

[34] The agreement has been amended by a protocol signed at Lake Success May 4, 1949, to which many of the above-listed states have become parties, plus the additional states of Ceylon and Pakistan. Department of State, Treaties in Force, October 31, 1956, page 210.

It would be hard to find a comparable issue on which there was such a universal value judgment.

The domestic laws of many of these states dealing with the control of obscenity are analyzed in St. John Stevas, *Obscenity and the Law*, 217–259 (1956).

(b) The United Kingdom, which has been re-examining its obscenity laws, is currently considering the adoption of a law based on the United States standard with additional restrictions as to material which exploits horror, cruelty or violence

For the past several years there has been extended discussion in Britain of the problem of its obscenity laws and the desirability of changing them. See, *e. g.*, St. John Stevas, *Obscenity and the Law*, (1956). On March 29, 1957, the proposed Obscene Publications Bill was read a second time in the House of Commons and referred to a select committee. While this bill has not yet been adopted it does indicate the product of several years' study and contains a suggested balancing of the competing interests of freedom for authors and protection from obscenity which drew support from both parties. Hansard, March 29, 1957, cols. 1493–1583. The proposed Obscene Publications Bill (reproduced in the Appendix, *infra*, p. 120) adopts a position quite close to that set forth in 18 U. S. C. 1461. In fact, the bill would extend by statute the definition of obscene to include any matter which "unduly exploits horror, cruelty or violence".

As a current attempt at finding the proper legislative standard to be applied to obscenity, this British bill demonstrates that in England the judgment is

that the competing societal interests call not for an abandoning of the control of obscenity but rather the extension of control to non-sexual interests.

(c) All but one State in the Union have adopted statutes based on the proposition that the public interest in morality outweighs any value in circulating obscene material

No clearer proof of how the United States weighs the competing societal interests could be asked than that given by the statutes of the various states. Every state except New Mexico has adopted legislation aimed at preventing the publication and distribution of obscene material. Report of the Select Committee on Current Pornographic Materials, H. Rept. 2510, 82d Cong. 2d Sess., p. 32–34. The state legislatures certainly reflect a common judgment as to the high interest in the preservation of public morality and the low value placed on any "idea" content in obscene material

In the light of this Court's often expressed view that the free speech and freedom of the press protected by the First Amendment are part of the liberty protected by the Fourteenth, a decision that Section 1461 was invalid under the First Amendment would seem to require the invalidation of all the state statutes as well.

(d) The Congress of the United States has repeatedly considered the problem of obscenity and repeatedly decided that more rigid restrictions were required

Apparently the first federal restriction was the customs ban against the importation of obscene material in 1842, 5 Stat. 548, 566, which prohibited the importation of indecent prints, paintings, lithographs,

etc. The scope of prohibited matter was broadened in 1857, 11 Stat. 168, which added "articles", "images", "figures" and "daguerreotypes". The Tariff Act of 1890, 26 Stat. 567, 614–615, added "book", "pamphlet", "paper", "writing", "advertisement" and "circular".

In 1865, it was made a misdemeanor to mail an obscene book, pamphlet, etc. 13 Stat. 504, 507. In 1872, the language was revised and broadened to include, among other things, scurrilous epithets on envelopes or postal cards. 17 Stat. 302. In 1873, the section was again broadened (17 Stat. 599); it was revised again in 1876. 19 Stat. 90. In 1888, the mailing of indecent matter on wrappers or envelopes was specifically prohibited in a separate provision. 25 Stat. 187, 188. During the same year the extent of coverage was broadened to make explicit that obscene private letters were also barred. 25 Stat. 496.

In 1897, Congress adopted the predecessor to Section 1462 by prohibiting the interstate transportation by common carrier of obscene material. 29 Stat. 512. The section was revised and amended in 1905. 33 Stat. 705. In the Criminal Code of 1909, what are now Sections 1461, 1462, and 1463 were all revised, and a new class of non-mailable matter, "filthy", was added. 35 Stat. 1129, 1138. See *United States* v. *Limehouse,* 285 U. S. 424, 426. In 1920, motion picture film was explicitly added to the material which could not be sent in interstate commerce by common carrier. 41 Stat. 1060.

In 1930, after extensive debate of which some was quoted above (*supra*, pp. 69–71), Congress adopted, in the Tariff Act of that year, procedures designed to prevent the importation of obscene matter. 46 Stat. 688. Four years later, the broadcasting of obscene language was made a crime. 48 Stat. 1091, 1100. In 1948, the language was revised when the various sections were codified. 62 Stat. 768. In 1950, phonograph records were specifically added to the materials which could not be shipped by common carrier in interstate commerce (64 Stat. 194), and in 39 U. S. C. 259a the Post Office was given explicit administrative authority to exclude obscene matter from the mail. 64 Stat. 451. In 1955, the phraseology of Section 1461 was again broadened and a new section was adopted prohibiting any interstate transportation of obscene material for sale or distribution. 69 Stat. 183. And in 1956, Congress provided a statutory basis for the preliminary impounding of mail pending administrative proceedings under 64 Stat. 451. Public Law 821, 84th Cong. 2d Sess., 70 Stat. 700.

The legislation reviewed above reflects a strong congressional policy of 115 years standing. Throughout that period Congress has repeatedly broadened and extended the scope of the restriction on obscene material to make them applicable to new inventions, such as phonograph records and motion picture film, and to make them more effective. The competing social interests have been weighed by Congress, and its judgment is unequivocal.

(c) The courts, in weighing the competing interests, have universally held that restrictions on obscenity are valid

In July 1788, Chief Justice McKean of the Supreme Court of Pennsylvania considered the state constitutional guaranty of the freedom of the press in *Respublica* v. *Oswald*, 1 Dallas 319, 326:

> The true liberty of the press is amply secured by permitting every man to publish his opinion: but it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

This same judgment, when weighing the moral interest of society against the excesses of the press, has been reached by state courts, federal courts, and this Court throughout the history of the country.

The state court decisions are far too numerous for citation here. The early decisions, however, shed some light on the judicial balancing of interest in the period following the adoption of the Constitution. See *supra*, pp. 21–25. In *The People* v. *Ruggles*, 8 Johns. (N. Y.) 290, the Supreme Court of the State of New York upheld a conviction for blasphemy as a public offense punishable by the common law of the state. In the course of his opinion, Chief Judge Kent said (pp. 294–295):

> * * * Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world?

In 1815, the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Sharpless*, 2 S. & R. 91, considered a case involving the commercial showing of a pornographic painting. The indictment charged that the defendants—

> intending the morals, as well of youth as of divers other citizens of this commonwealth, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, * * * did exhibit, and show for money, to persons * * * a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman * * * [at pp. 91–92].

Following are excerpts from the opinions of Chief Justice Tilghman and Justice Yeates:

> That actions of *public indecency*, were always indictable, as tending to corrupt the public morals, I can have no doubt; * * * Neither is there any doubt, that the publication of *an indecent book* is indictable * * *
>
> * * * * *
>
> * * * although every immoral act, such as lying, &c. is not indictable, yet where the offence charged, is destructive of morality in general; where it does or may affect every member of the community, it is punishable at common law. The destruction of morality renders the power

> of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together. The corruption of the public mind in general, and debauching the manners of youth in particular by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences * * * [pp. 101–103].

The lower federal courts have on numerous occasions specifically considered the constitutional questions here raised, and have invariably held this statute and those comparable to it valid. *Schindler* v. *United States*, 221 F. 2d 743 (C. A. 9), certiorari denied, 350 U. S. 938 (Section 1461 constitutional; clear and present danger test does not apply); *United States* v. *Rebhahn*, 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629 (former 18 U. S. C. 334 held constitutional against charge of vagueness); *Coomer* v. *United States*, 213 Fed. 1 (C. A. 8) (predecessor to existing statute held constitutional); *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385 (C. A. 6) (predecessor to existing section held not violative of free press, nor vague); *Knowles* v. *United States*, 170 Fed. 409 (C. A. 8) (Rev. Stat. 3893 does not violate religious freedom or freedom of press); *Rinker* v. *United States*, 151 Fed. 755 (C. A. 8) (Rev. Stat. 3893); *Besig* v. *United States*, 208 F. 2d 142 (C. A. 9) (customs proyision, 19 U. S. C. 1305 (a), upheld).

This Court has time and again referred to the validity of the restrictions on obscenity and frequently used that proposition as the firm starting point from which to consider other problems. The validity of the statute has repeatedly been upheld.

That this matter has been taken as obvious and not requiring extended discussion makes even more clear the value which our society instinctively places on each of the interests involved. We set out below, in chronological order, reference to opinions of the Court or of its individual members, touching on the validity of restrictions on obscenity:

In 1877, in *Ex parte Jackson*, 96 U. S. 727, 736, the Court upheld the validity of a statute making it a crime to send lottery circulars through the mail. The lottery statute was upheld as being an extension of the valid restriction on excluding obscene matter from the mails:

> In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared "that no obscene, lewd, or lascivious book * * * shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things * * * shall be deemed guilty of a misdemeanor * * *"
>
> All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries,—institutions which are sup-

> posed to have a demoralizing influence upon the people. * * *

In 1890, the Court considered the comparable provisions in Section 1 of the Act of July 12, 1876, 19 Stat. 90, and found that an obscene personal letter did not fall within the statute as then drafted. *United States* v. *Chase*, 135 U. S. 255, 261. The Court had no doubts as to the validity of the statute:

> We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination. *Ex parte Jackson*, 96 U. S. 727. This object seems to have been accomplished by forbidding the use of the mails to books, pamphlets, pictures, papers, writings and prints, and other publications of an indecent nature, and also to private letters and postal cards whereon the indecent matter is exposed to the inspection of others than the person to whom the letter is written.

In 1895, a conviction under the then obscenity statute, Rev. Stat. 3893, was affirmed by the Court where the issue related to the validity of the indictment. *Grimm* v. *United States*, 156 U. S. 604.

In 1896, the statute was before the Court three times. The first of these cases, *Rosen* v. *United States*, 161 U. S. 29, involved extended consideration of the extent to which the indictment had to allege which particular pictures and passages were obscene. It also turned on the question of what was meant by

"knowingly" using the mails for the transmission of an obscene publication. The Court said:

> The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious. [161 U. S. at 41–42.]

The second 1896 case was *Swearingen* v. *United States*, 161 U. S. 446, 451, which found that the lower court had erred in instructing the jury that a particular newspaper article was obscene. The article in question (161 U. S. at 447) was coarse and vulgar, but had few sexual references. The Court said:

> The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel.

The third 1896 case was *Andrews* v. *United States*, 162 U. S. 420, which found that under the amended statute a person could be convicted for mailing an obscene private sealed letter.

In 1897, the Court, in *Robertson* v. *Baldwin*, 165 U. S. 275, 281, was not faced with the statute in question but said:

> Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles or other publications injurious to public morals or private reputation; * * *

In 1897, a conviction under Rev. Stat. 3893 was affirmed in *Price* v. *United States*, 165 U. S. 311, and in *Dunlop* v. *United States*, 165 U. S. 486, 501, where the Court considered the scope of the statute:

> It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context, and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, * * *. We have no doubt that the finding of the jury was correct upon this point.

In 1904, came the Court's decision in *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, in which it said:

> For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked.

In upholding the validity of the Mann Act in *Hoke* v. *United States*, 227 U. S. 308, 322, the Court relied, as a basic step in its reasoning, upon the validity of the restraint on obscene matter:

> * * * if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature * * *, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

In the same year, 1913, the Court upheld another conviction under the postal obscenity statute. *Bartell* v. *United States*, 227 U. S. 427.

In 1925, the validity of the postal obscenity statute was again used by the Court to support its conclusion as to another law. *Hygrade Provisions Co.* v. *Sherman*, 266 U. S. 497, 502:

> Many illustrations will readily occur to the mind, as for example statutes prohibiting the sale of intoxicating liquors and statutes prohibiting the transmission through the mail of obscene literature, neither of which have been found to be fatally indefinite because in some instances opinions differ in respect of what falls within their terms.

In considering the constitutional limits on the restraints which may be imposed on the freedom of the press in *Near* v. *Minnesota*, 283 U. S. 697, 716, the Court stated:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing

> dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications.

In 1932, Mr. Justice Brandeis wrote the opinion of the Court in *United States* v. *Limehouse*, 285 U. S. 424, 425, reversing the decision below and holding that the statute must be construed more broadly than had been done by the lower court:

> They [the letters] were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term.

In 1938, in *Lovell* v. *City of Griffin*, 303 U. S. 444, 451, the Court had before it the issue of the constitutionality of a restriction on freedom of the press:

> The ordinance is not limited to "literature" that is obscene or offensive to public morals or that advocates unlawful conduct.

Again in 1942, in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572, the Court was considering the constitutional limits on free speech, and used the validity of restraints on obscenity in support of its decision as to epithets:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate

> breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310.

In 1946, Mr. Justice Douglas writing for the Court in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158, stated:

> The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted.

In *Winters* v. *New York*, 333 U. S. 507, the Court heard argument three times to aid it in its consideration of the limits on state regulation of the content of the press. In holding invalid the New York statute relating to magazines which massed stories dealing with crime, the Court pointed out that magazines are "subject to control if they are lewd, indecent, obscene, or profane," and referred to the permissible uncertainty in the standard "obscene, lewd, lascivious, filthy, indecent or disgusting" (333 U. S. at 510, 518).

In *Kovacs* v. *Cooper*, 336 U. S. 77, 80, the Court relied upon the fact that "obscene" was sufficiently definite in holding that "loud and raucous" was an adequate standard.

In 1952, the Court again relied upon the validity of restrictions on obscenity in reaching a decision on the statute in question in *Beauharnais* v. *Illinois*, 343 U. S. 250, 266. The Court stated:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances.

In the same year, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 506, the Court left open the question of whether a state, through *prior censorship*, can prevent the showing of obscene moving pictures. The Court did not suggest, however, any doubts as to the validity of post-conduct punishment for the circulation of obscene material.

Thus this Court, over a seventy-five year period, has consistently and repeatedly considered the restriction here involved as valid and as a model, both as to definiteness and substance, of the sort of restriction to which the press may properly be subjected. The constitutionality of this provision has been relied on in determining the validity or invalidity of other forms of restraint. These decisions reflect not merely dicta but the considered judgment of the Court in some of the most controversial cases that have been before it. The expressions of the Court reflect an appreciation

of the value to society of public morality, and the worthlessness to society of obscene matter.[18]

As we have said above, the worth of social interests is judged by the regard with which they are held by enlightened society. There can be no doubt as to the views of the country or as to the prior views of this Court.

2. AS TO WHAT FALLS WITHIN THE "CONCEPT" OF OBSCENITY, THERE HAVE BEEN MARGINAL CHANGES AND DIFFERING VIEWS IN THE "BORDERLINE" AREA BUT OBSCENITY ITSELF REMAINS DISFAVORED.

As petitioner and appellants point out, the boundary line between what is called obscene and what is tolerated has shifted and continues to shift with the passage of time. This peripheral change has been modest, and "hard-core" pornography, the bulk of the published material caught by Section 1461, has never been tolerated. Even today, different countries have different ideas as to exposure, but none, so far as we know, considers as socially acceptable anything which degrades sexual intercourse.

[18] In 1947, Professor Chafee considering the constitutionality of 18 U. S. C. 1461, observed (*Government & Mass Communications*, vol. 1, p. 282):

> The effect of the First Amendment and freedom of the press upon the administrative mechanism of the Post Office is more important practically than their effect on the postal power of Congress. Questions of the unconstitutionality of legislation are somewhat remote from reality, because the existing postal statutes, if properly construed, seem to fall within the valid powers of Congress.

But in any case the significant point here is that changing mores as to the content of "obscenity" reflect no change as to the non-value of what is concededly obscene. That is still strongly disfavored in all parts of the world and all parts of this country. Different people may have different ideas of what is obscene even at any one time, but this does not indicate that they have any differences on the conclusion that what *is* obscene should not be circulated. It does not indicate any difference as to the relative value with which the competing social interests are held.

Petitioner argues that the more liberal attitude of today as to what is obscene justifies overturning the universal judgment of this country since it was established. We would suggest just the contrary. Within the United States, the edges of obscenity have been melting, so that discussion of many subjects, including sex, can now take place in more direct terms. These minor changes mean that, whatever idea content there may have been which was restricted fifty or seventy-five years ago, there is less today. When there was a greater risk of losing ideas of value by restricting obscenity, the nation decided that obscenity must nonetheless be restrained. Today, when less falls within the concept of obscenity, the result is *a fortiori*. Accordingly, there is less reason than ever before to allow material that is admittedly obscene to be circulated through the mails. Material that is obscene by today's standards is, as petitioner would have to agree, less likely to contain a worthwhile idea than what was considered obscene before.

II

The Fifth Amendment

SECTION 1461 IS NEITHER SO BROAD NOR SO VAGUE AS TO DEPRIVE PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT

Section 1461 is attacked as violative of the Fifth Amendment on two separate grounds. The first of these is that it is too broad. It is said that the legislation is not reasonably restricted to the evil with which it deals, and that, like the Michigan statute considered in *Butler* v. *Michigan*, 352 U. S. 380, 383, the effect is "to burn the house to roast the pig." The second respect in which it is urged that the statute fails to meet the standards of due process is in the definition of the crime. It is said that the statute is so vague that it does not give the jury an adequate basis for a decision based on law. The Government submits that, on the contrary, Section 1461 is neither too broad nor too vague.

A. To prohibit the mailing of publications which are calculated to corrupt and debauch the minds and morals of the average person in the community is no broader a restraint than required

In Point I, *supra*, at pp. 58–59, 71–74, we have discussed, with respect to the First Amendment, the charge that Section 1461 is too broad a restriction on free speech. We argued that, in the light of the relative balance of the competing interests involved, the statute is an appropriate restriction and therefore does not violate the First Amendment. Now, we consider

the companion issue of whether the statute is too broad under the Due Process clause of the Fifth Amendment—whether, aside from considerations of free speech, Section 1461 is too broad a prohibition for the specific evil with which Congress was dealing.

The Court's decision in this Term in *Butler* v. *Michigan*, 352 U. S. 380, held invalid a state statute which made it a crime to sell to an adult a book "manifestly tending to the corruption of the morals of youth". The Court found that the legislation was not reasonably restricted to the evil with which it was said to deal. In contrast to the Michigan statute, Section 1461 is as narrowly drawn a criminal statute as it could be to meet the evil at which it is directed. At the trial, the judge correctly charged the jury that to find petitioner guilty under Section 1461 they had to find that the material which he had mailed was "calculated to corrupt and debauch the mind and morals". The judge also instructed the jury that they must appraise the impact of the material on the "average person in the community". What the statute is aimed at is the prevention of the circulation of obscene material which is likely to corrupt the morals of people in general—not any particular class, not children, not the highly susceptible. The jury found the petitioner guilty. The court of appeals found that the evidence amply supported the verdict. Under the limited grant of certiorari, it is to be taken as given that the material to which the statute was construed to apply is likely to corrupt the morals of the average member of the community.

Assuming the validity of the statute under the First Amendment—namely, that Congress may properly forbid the distribution of printed material to persons whom it is likely to corrupt—is a statute unconstitutionally broad for due process purposes which prevents the mailing of material likely to corrupt the average person in the community? By hypothesis, the only narrowing of the statute that could conceivably be done would be to exempt from its scope those exceptional individuals who, because they were particularly hardened, or were blind, or had some other protection against the influence of the material, or because their morals were already fully corrupted, would not be subject to influence by that which would affect the average person.

But statutes do not have to be designed to except from their operation the exceptional case. It is obvious that, in the public interest, speed limits can be adopted even though some skilled drivers could safely go faster without creating any greater risk of injury than that arising when the average person drives at the speed limit. And non-intoxicants can be prohibited in order to control intoxicants. Cf. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Carolene Products Co.* v. *United States*, 323 U. S. 18; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–489. The constitutional requirement of due process is that there be a close relationship between the restriction and the evil, not that every exceptional circumstance be omitted from coverage by the act. To protect the

average person in the community Congress need not provide special mailing privileges for a few.[35]

Unlike the statute involved in *Butler* v. *Michigan*, 352 U. S. 380, Section 1461 restricts only a method of distribution in which it is practically impossible to distinguish whether the recipient of the material will be within the class of those susceptible to it. In the first place, it is impossible to tell who is susceptible to the material and who is not. Although we must concede that there are undoubtedly some persons whose morals would not be corrupted by exposure to a particular piece of pornography, there is no known way of separating them from the balance of the population. And although certain pornographic material might not affect one member of the community, more potent pornography, such as motion picture films of sexual orgies, might. It would be impossible to draft or administer a law which judged the material to be mailed by the likelihood that it would corrupt the particular recipient. And even if such a law could be written, it would raise far more serious questions than that here involved of whether restrictions based

[35] Whether or not Congress can prohibit the distribution of obscenity by other means to those not susceptible to it, Congress can certainly decide that it need not devote the mail service to carrying material which is harmful to the average person in the community. There can be no constitutional requirement that Congress must, for the benefit of the few, devote the postal service to distributing material which admittedly tends to corrupt the morals of the average person in the community. See *supra*, pp. 71–73.

on such subjective standards would provide due process of the law.

This is especially true because we are here dealing with a restriction on what goes through the mail. This fact provides additional justification for the reasonableness of the prohibition contained in Section 1461. There is no practicable method of determining even the age, let alone the susceptibility, of the recipient of material sent through the mails. It is not like the Michigan statute where the seller can look at the buyer and be expected to find out whether he is a minor. As the liquor laws demonstrate, such an across-the-counter transaction can be regulated in terms of the recipient. But the mailing list of advertising circulars cannot be similarly scrutinized. Not only is there no standard by which to judge who is not the average member of the community but there is no way of making sure that material sent through the mail would only go to such recipients. See also *supra*, pp. 61, 71–74; *infra*, pp. 106–107.

It is argued that the statute is too broad because it applies to all—that those who do not want to look at obscenity do not have to buy it. But a prime purpose of the restriction, as with the regulation of narcotics, is to restrain the distribution of material to those who want it. Further, as petitioner's case demonstrates, the commercial distribution of obscenity is not limited to those who want it. Of the exhibits for which petitioner was found guilty most were advertising circulars; only one was published matter for which a price had been paid.

B. *The statutory test, "obscene, lewd, lascivious, or filthy," is not so vague and indefinite as to deprive petitioner of his liberty without due process of law*

1. THE COMMON LAW BACKGROUND AND JUDICIAL CONSTRUCTION MAKE UNDENIABLY CLEAR THE CENTRAL MASS OF MATERIAL AT WHICH THE STATUTE IS DIRECTED

There can be no doubt as to what is the central mass of material at which Section 1461 is directed. A common law background of centuries and over a hundred years of statutory and judicial history in this country provide a firm guide. There is a solid core of material which, within the common law and under the statutes, is known to be obscene without doubt. This includes those matters which explicitly and purposefully deal with sex conduct in a degrading or perverted way, with no artistic aspect whatever—dirt for dirt's sake.

In particular, the judicial decisions construing the concept of obscenity not only make clear the central mass of material at which the statute is aimed but go far to lay down the standards by which the borderline areas are to be blocked out. Under these standards, the statute is limited to that material which, taken as a whole, constitutes a present threat to the morals of the average person in the community. *United States* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2); *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182 (S. D. N. Y.), affirmed, 72 F. 2d 705 (C. A. 2). Various subsidiary criteria now employed in considering the question of whether material is obscene prune out that which is calculated by its content and stereotyped repetition of such content to portray *ad*

nauseum the tasteless, offensive, and solely lustful. Thus, the author's purpose may be relevant. *United States* v. *Dennett*, 39 F. 2d 564, 659 (C. A. 2) ("The defendant's discussion of the phenomena of sex is written with sincerity of feeling and with an idealization of the marriage relation and sex emotions."); *United States* v. *One Book Entitled "Ulysses"*, 72 F. 2d 705, 706–707 (C. A. 2); *United States* v. *One Book, Entitled "Contraception"*, 51 F. 2d 525, 527 (S. D. N. Y.); *United States* v. *Hornick*, 131 F. Supp. 603 (E. D. Pa.), affirmed, 229 F. 2d 120 (C. A. 3); *Parmelee* v. *United States*, 113 F. 2d 729, 735 (C. A. D. C.). The view of book reviewers and the appraisals of competent critics is distinctly helpful. *United States* v. *One Book Called "Ulysses"*, 5 F. Supp 182 (S. D. N. Y.), affirmed, 72 F. 2d 705 (C. A. 2); *United States* v. *Levine*, 83 F. 2d 156, 158 (C. A. 2); *United States* v. *Rebhuhn*, 109 F. 2d 512, 515 (C. A. 2), certiorari denied, 310 U. S. 629. Consideration is given to the nature of the advertising, the promotional material, and the reputation of the publisher (*Burstein* v. *United States*, 178 F. 2d 665 (C. A. 9); *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938; *United States* v. *Rebhuhn*, 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629); as well as to the audience to whom the book is directed, and whom it is likely to reach (*United States* v. *Dennett*, 39 F. 2d 564, 568 (C. A. 2); *Parmelee* v. *United States*, 113 F. 2d 729, 731 (C. A. D. C.); *United States* v. *Rebhuhn*, 109 F. 2d 512, 514–515 (C. A. 2), certiorari denied, 310 U. S. 629).

With these aids, the ultimate question is the effect of the material "on a person with average sex instincts", *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, 183 (S. D. N. Y., affirmed, 72 F. 2d 705 (C. A. 2). Moreover, the "dominant effect" of a book as a whole is the criteria, not the effect of isolated passages torn from context. As the Second Circuit pointed out in the *Ulysses* case (72 F. 2d at 708):

> [W]e believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence: * * *.[36]

Under these tests, the central coverage of the statute is undeniably plain—"hard-core" commercial pornography and comparable non-commercial material—and the more peripheral areas of coverage are also indicated with sufficient definiteness. The de-

[36] See, in accord, *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938; *Parmelee* v. *United States*, 113 F. 2d 729 (C. A. D. C.); *United States* v. *Levine*, 83 F. 2d 156 (C. A. 2); *United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (E. D. Wash.); *United States* v. *One Unbound Volume, Etc.*, 128 F. Supp. 280 (D. Md.); *New America Library of World Literature* v. *Allen*, 114 F. Supp. 823 (N. D. Ohio); *United States* v. *Dennett*, 39 F. 2d 564 (C. A. 2); *Walker* v. *Popenoe*, 149 F. 2d 511 (C. A. D. C.); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S. D. N. Y.); *United States* v. *One Book, Entitled "Contraception"*, 51 F. 2d 525 (S. D. N. Y.); *One, Inc.* v. *Olesen*, No. 15,139, decided Feb. 27, 1957 (C. A. 9).

liberate purveyor of pornography knows definitely that his product is forbidden. On the other hand, there is little threat to literature or art. The classics are not in danger.[37]

2. IN THE NATURE OF THE PROBLEM, THERE CANNOT BE A FIXED AND PRECISE BOUNDARY TO OBSCENITY WHICH CAN BE SAFELY APPROACHED WITHOUT THE RISK OF GOING OVER

The subject matter of obscenity is words and pictures. As to each there are endless variations. There can never be a sharp and distinct boundary which the publisher of entertainment material can approach without the risk of being found to have crossed the line. The problem is most clearly seen in the field of photographs. Assume, for example, that a motion picture film is taken which starts with a couple fully clothed and, with pictures being taken at several frames per second, ends up with the couple naked and engaged in forbidden sexual conduct. Each individual frame is then enlarged, a regular photographic print made of it, and the prints lined up. If the prints are then considered as individual photographs, all will agree that the photograph at one end of the line may be freely circulated, and that the photograph at the other end is obscene. Going through these photographs from one end to the other, a point must be reached where they change from the acceptable to the obscene, and yet the difference between the two photographs will hardly be discernible to the naked eye.

[37] The customs statute specifically empowers the Secretary of the Treasury to admit "classics". 19 U. S. C. 1305 (a).

This is not as hypothetical a case as it may seem. The entertainment magazines, which stress the erotic interest, continue to pose girls with less and less on, and in more and more provocative postures. Each is competing with the others to get as close to the obscenity line as possible. See *supra*, pp 35–37. The publishers, who contend that they seek a definite line, ridicule any line that is proposed and point out that there is really little difference between what falls on one side of the line and on the other. No matter where the standard were drawn, there would be borderline cases; there would always be commercial producers trying to cater to the pornographic interest—trying to push their product closer to the legal line.

With written material the problem is simpler if only because fewer people try deliberately to write borderline material.[38] But here, again, there cannot be a razor-sharp and clear-cut line. Each work is judged as a whole. No mechanical test could replace such a judgment.

Even the outer boundary line is not now as vague as petitioner would suggest. The continental mass of commercial pornography is well marked on the maps, and is unmistakable. The shoal waters around the edge are also marked with well known buoys and an occasional wreck. No publisher approaches these waters without knowing what he is doing. Petitioner, with more than twenty-five years' experience in and

[38] Mr. Huntington Cairns, long-time advisor to the Treasury Department in the administration of its statute, comparable to Section 1461, has informed us that, in his view, there is no real difficulty in administration except as to pictures.

out of the courts (Pet. Br. 5–6), is typical of the publisher of borderline material. He knows well the interests to which he is catering, and the risks he is taking. He knows that many of the community will consider what he is circulating to be obscene. He weighs the chances on whether a jury of twelve will unanimously agree beyond a reasonable doubt that the material is so bad that it is likely to corrupt the morals of the average person in the community. Cf. *United States* v. *Wurzbach*, 280 U. S. 396, 399; *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340; and discussion *infra*, pp. 108–110.

It is argued that the statute is unconstitutionally vague because a jury in one part of the country might reach a different conclusion as to the same material from that which would be reached somewhere else. There is no merit in this contention. In certain instances, different results might be reached by different juries within the same city. This could be true of many a criminal case and many criminal statutes. But, by and large, the toleration of the country as to sex discussion and exposure is reflected in magazines of national circulation, in movies, radio and television, and in the newspapers. The very uniformity of social mores which has been condemned by many minimizes the problem. There is nothing to suggest that differences as to obscenity are as great as those between a city and a country jury on such well-recognized crimes as reckless driving or disorderly conduct.

The very differences which may be reached by a jury under the standard of obscenity protect the

freedom of press from restraint which would be imposed by a rigid statute which could not reflect more liberal ideas in the borderline area. The provision of a jury trial is primarily for the benefit of the defendant. Such variations as may result will usually work to his favor, since a verdict against him must be the unanimous view of all members.

3. THE STATUTORY STANDARD IS THE BEST THAT HAS BEEN DEVISED AND CERTAINLY LIES WITHIN THE RANGE OF LEGISLATIVE JUDGMENT

The many other statutes dealing with the problem demonstrate the language of Section 1461 is as definite as any that has been devised. A number of state statutes limit themselves to the word "obscene". *E. g.*, Fla. Stat. § 847.01 (1941); Tenn. Code Ann. § 11190 (1934); W. Va. Code § 6066 (1949); Wis. Stat. § 351.38 (1951). Others closely parallel the federal statutes. *E. g.*, "obscene, lewd, lascivious, filthy, indecent, disgusting or impure" (Utah Code Ann. § 76–39–1 (1953)); "obscene, lewd, lasciyious, filthy, indecent or disgusting" (N. Y. Penal Law § 1141 (1953) and Pa. Stat. Ann. Title 18, § 4524 (Purdon 1939)).

Some states have included within the statute language comparable to that with which the jury is instructed under the federal statutes. The New Hampshire statute defines an obscene book as one—

> whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of anyone viewing or reading it. [N. H. Laws 1953, c. 233.]

The Georgia statute (Ga. Code Ann. § 26–6301a (1953)) defines obscene literature as—

> any literature offensive, to * * * chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed.

None of these would seem to provide any greater degree of certainty than the standard of Section 1461.

Perhaps the best indication that the present statute, as construed, provides as much certainty as can be expected is the product of several years' study looking to the reform of the British laws on obscene material. See St. John Stevas, *Obscenity and the Law* (1956). As we have already noted (*supra*, p. 78), the text of the Obscene Publications Bill which was recently given a second reading (Appendix, *infra*, pp. 120–125) comes remarkably close to adopting the standard of Section 1461, as generally construed and as interpreted in this case. A person who knowingly distributes obscene matter is made guilty of an offense. Matter is to be deemed obscene, if—

> its dominant effect is such as to be reasonably likely to deprave and corrupt persons to or among whom it was intended, to be distributed, circulated, or offered for sale, * * *

So far as certainty in definition of the crime goes, that standard is the equivalent of Section 1461, as construed.[39]

[39] The provision that the effect of a book shall be judged by its impact on persons of the class among whom it was intended the book should be distributed was apparently designed to make sure that books intended for adults need not be held down to a child's standard. See Hansard, March 29, 1957, col. 1506, quoting from this Court's opinion in *Butler* v. *Michigan*, 352 U. S. 380. It would also have the effect of protect-

4. THE PRESENT STATUTORY CONCEPT OF OBSCENITY MEETS THE STANDARDS OF DEFINITENESS LAID DOWN BY THIS COURT

(a) To satisfy the constitutional requirement of clarity in a criminal statute, fair notice must be given as to the conduct which is deemed criminal. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U. S. 612, 617; *Jordan* v. *DeGeorge*, 341 U. S. 223, 230-232; *United States* v. *Petrillo*, 332 U. S. 1. But, as long as there is a core of conduct definitely understood as unlawful, it matters not "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls * * *". *United States* v. *Petrillo, supra*, at 7; *United States* v. *Harriss, supra*.[40]

The concept of definiteness demands no exact or precise standard. It need not be automatic. Thus, as applied to petitioner, 18 U. S. C. 1461 is at least as definite as other statutes sustained by this Court,[41]

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ing the legitimate publisher of, say, a scientific work, while allowing prosecution against a distributor who was circulating it generally.

[40] See, also, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 103-104; *Williams* v. *United States*, 341 U. S. 97, 101-102; *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-232; *Dennis* v. *United States*, 341 U. S. 494, 516; *Beauharnais* v. *Illinois*, 343 U. S. 250, 263-264; *Robinson* v. *United States*, 324 U. S. 282, 286; *United States* v. *Wurzbach*, 280 U. S. 396, 399.

[41] E. g., *United States* v. *Wurzbach*, 280 U. S. 396 ("political purposes"); *United States* v. *Petrillo*, 332 U. S. 1 ("in excess of the number of employees needed by such license to perform actual services"); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 ("any offensive, derisive or annoying word"); *Gorin* v. *United States*, 312 U. S. 19 ("connected with or related to the

Each of the cited cases involved a general standard of considerable latitude, yet individuals were required to meet them. Cf. *American Communications Assn. v. Douds*, 339 U. S. 382, 412–413; *Dennis* v. *United States*, 341 U. S. 494, 515. We point out particularly that the Court has found that an Oregon statute providing that everyone shall drive "in a careful and prudent manner * * * and in no case at a rate of speed that will endanger the property of another" was sufficiently definite. "Following the authority in the *Nash* case, we sustained in *Miller* v. *Oregon*, *per curiam*, 273 U. S. 657, a conviction of manslaughter under a statute of Oregon." *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 464, 465. It could not be said that "ob-

national defense"); *Minnesota* v. *Probate Court*, 309 U. S. 270 ("psychopathic personality"); *Kay* v. *United States*, 303 U. S. 1 ("willfully overvalues any security"); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 ("fair and open competition"); *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77 ("reasonable variations shall be permitted"); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8 ("unreasonable waste of natural gas"); *Omaechevarria* v. *Idaho*, 246 U. S. 343 ("range usually occupied by any cattle grower"); *Boyce Motor Lines* v. *United States*, 342 U. S. 337 ("practicable and feasible"); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 ("Kosher"); *Robinson* v. *United States*, 324 U. S. 282 ("liberated unharmed"); *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86 ("reasonably calculated", "tend"); *United States* v. *Alford*, 274 U. S. 264 (whether a fire is "near" the public domain); *United States* v. *Ragen*, 314 U. S. 513 ("a reasonable allowance for salaries or other compensation for personal services actually rendered"); *Lloyd* v. *Dollison*, 194 U. S. 445 ("wholesale" or "retail"); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (Hatch Act: "active part in political management or in political campaigns"); *Sproles* v. *Binford*, 286 U. S. 374 ("shortest practicable route"); *Miller* v. *Strahl*, 239 U. S. 426 ("to do all in one's power").

scenity", with its long statutory tradition and common law heritage, is less definite a standard than is reckless driving.

Of particular significance for obscenity is the accepted principle that a common law heritage and tradition is important in determining the clarity of statutory language. In *Jordan* v. *DeGeorge*, 341 U. S. 223, 229 "moral turpitude" was held to be sufficiently definite with the comment: "It is significant that the phrase has been part of the immigration laws for more than sixty years"; cf. *Nash* v. *United States*, 229 U. S. 373, where "restraint of trade" was construed in the light of its common law background.

As for the so-called borderline cases, so much discussed in the various briefs, the Court has also spoken clearly. Justice Holmes observed in *United States* v. *Wurzbach*, 280 U. S. 396, 399:

> But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

More recently, the Court said: "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340.

(b) But one need not look at other statutes to find the standard of definiteness approved by this Court. The concept of obscenity has repeatedly been before

the Court, and repeatedly been found sufficiently definite. In fact, the recognized validity of the obscenity standard has been used as a foundation for decisions on other statutes.[42]

In *Rosen* v. *United States*, 161 U. S. 29, 42, the Court discussed the predecessor to Section 1461:

> Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious. . .

Again in *Swearingen* v. *United States*, 161 U. S. 446, 450–451, the Court considered the same statute and pointed out that its definition derived from the common law:

> The offence aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * *

In *Winters* v. *New York*, 333 U. S. 507, both the majority and the dissent started from the proposition that the concept of obscene and indecent was sufficiently definite for a criminal statute. Mr. Justice Reed, for the majority, wrote:

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[42] See, also, the related discussion under Point I on the First Amendment, *supra*, at pp. 84–93.

> Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. * * * The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. [333 U. S. at 515.]

The opinion then went on to refer to the difficulty of defining the line between what is unconstitutionally vague and the *permissible* standard of—

> describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting * * * [333 U. S. at 518.]

And in reaching its conclusion that the statute there involved was too vague, the Court pointed out:

> The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. [333 U. S. at 519.]

In *Kovacs* v. *Cooper*, 336 U. S. 77, 80, the Court again used the words "obscene, lewd, lascivious, filthy, indecent or disgusting" as—

> examples of permissible standards of statutes for criminal prosecution.

With this proposition as a basis for its reasoning, Mr. Justice Reed's opinion went on to find that the ordinance there involved complied with the requirements of definiteness and clarity.

It is submitted that the Court should not depart so widely from its prior views as to find at this time that the concept of obscenity, which has been used as a model for a permissible standard, is now so vague as to deprive petitioner of his liberty without due process of law.

III

The Ninth Amendment

IN EXERCISE OF ITS EXPRESSLY DELEGATED POWER OVER THE POST OFFICE, THE UNITED STATES MAY PROPERLY PUNISH THE MAILING OF OBSCENE MATERIAL WITHOUT INFRINGING UPON ANY RIGHT RESERVED TO THE PEOPLE UNDER THE NINTH AMENDMENT

It is argued that Section 1461 violates unenumerated rights reserved to the people under the Ninth Amendment. We believe that this issue is necessarily resolved by the decision as to the First Amendment.

The statute in question was adopted in exercise of the postal power delegated to the United States by Article I, section 8, clause 7 of the Constitution. There can be no doubt as to the general power of the United States to control what is sent through the mail and to punish persons for violation of its laws in this regard. *Ex parte Jackson*, 96 U. S. 727, and see *supra*, pp. 71–73. The exercise of this delegated power is unrestricted, unless it is cut across by some other explicit provision of the Constitution. If the Court should find that Section 1461 violates the First Amendment, no further inquiry need be made. But if, as we contend, the First Amendment

does not prevent the adoption of Section 1461 as an exercise of the postal power, then there is no provision of the Constitution which would limit the postal power.

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily, the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. [*United Public Workers* v. *Mitchell*, 330 U. S. 75, 95–96.]

To uphold petitioner's position on the Ninth Amendment, should he lose on the First, would require the Court to reach two rather remarkable conclusions: First, that there was reserved to the people by the Ninth Amendment some kind of a right to publish and distribute obscene material which was greater in scope than the freedom of the press protected by the First Amendment; and, secondly, that this unenumerated right reserved to the people under the Ninth Amendment could operate to take back some of the power expressly delegated to the United States in Article I, section 8. There is no support for either proposition.

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IV

The Tenth Amendment

UNLESS BARRED BY THE FIRST AMENDMENT, THE EXERCISE BY THE UNITED STATES OF ITS EXPRESSLY DELEGATED POSTAL POWER DOES NOT INFRINGE ON RIGHTS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

We believe that the question of the Tenth Amendment also turns on the decision as to the First Amendment. We accept, of course, the proposition that the United States was given no expressly delegated power to control the press directly and also that the First Amendment cuts across the delegated powers in Article I, section 8. The First Amendment sets a limit on the extent to which the delegated powers may be used to restrain excesses of speech or press. Congress may not use its postal or commerce powers to abridge the freedom of the press in violation of the First Amendment.

But if this Court has been correct in its prior holdings, and if we are correct in our argument under Point I, that punishment for sending obscene material through the mail does not violate the First Amendment, then the law providing for such punishment is clearly within the delegated postal power. Falling within the postal power, it is not one of the rights reserved to the states.

There can be no doubt that, unless barred by an express constitutional restriction, the delegated powers may be used to control matters primarily subject to state control. Although the United States may not

be able to regulate lotteries as such, it may prevent the sending of circulars about lotteries through the mail, *Ex parte Jackson*, 96 U. S. 727, and bar the interstate transportation of lottery tickets. *Champion* v. *Ames*, 188 U. S. 321. Although the police power governing the adulteration of food and the conduct of women was reserved to the states, Congress may use its delegated power over interstate commerce to seize adulterated food shipped in interstate commerce, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, or to punish for the interstate transportation of women for immoral purposes. *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470, 491:

> * * * the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Similarly, Congress can prohibit the use of the mails to defraud, even though the states have the primary responsibility for protecting against fraud and deceit.

The general principle was summed up by Mr. Justice Brandeis in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or

that it may tend to accomplish a similar purpose.

The numerous cases discussed above (*supra*, pp. 84–92) in which the Court has upheld the validity of the postal restriction on obscenity are not only holdings that such power is consistent with the First Amendment but also that such power is not barred by the Tenth Amendment. There is thus no question of the states' having a reserved right to regulate obscene material in the United States mails—unless it is now found that the First Amendment prevents the Federal Government from doing so. If Section 1461 is valid under the First Amendment, it does not conflict with the Tenth. If it is invalid under the First, the Court need not bother to consider the Tenth.

But beyond this analysis, there is no merit in the suggestion that each state should be free to decide what constitutes obscenity for mailing purposes and whether such material should be allowed to circulate in that state via the United States mails. Any such system would be impossible to administer. The Post Office could not have forty-eight standards of what was mailable. It would have to carry freely everything sent, even though to send it was a crime in the state in which it was mailed and to receive it was a crime in the state where it was received. Under this view, the United States would be required by the Constitution to aid in the circulation of obscene material which was illegal in every state. The United States would be required to receive from abroad advertisements for pornography as well as pornography

itself (and presumably from the District of Columbia), and transport it in the mail to anyone in the country. We can see no merit in such a construction of the Constitution, wholly out of keeping with the constitutional history of this country which increasingly has involved the use of the delegated powers in support of anything which the states can do under the Fourteenth Amendment.

Petitioner argues that to hold Section 1461 invalid would not remove all restraints on obscenity—that the states would still be free to impose restraint. To support his view that the Constitution permits state restraint he quotes from Jefferson and from Congressional debate in 1836 (Pet. Br. 10, 12, 18–21). These general expressions of view all took place prior to the adoption of the Fourteenth Amendment.

This Court has made clear that free speech and freedom of the press are part of the liberty that is protected by the Fourteenth Amendment. Although the standards of permissible regulation may not be precisely the same, it is the same liberty which is protected. It would certainly be an odd result, inconsistent with prior views, to hold that the United States was constitutionally required to carry through the mail material of which the states could prevent the publication. Punishment for sending obscene material through the mail does not infringe on rights reserved to the states.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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APRIL 1957.

APPENDIX

Proposed British Legislation on Obscenity

Printed below is the pending Obscene Publications Bill which was read a second time in the House of Commons on March 29, 1957. The debate appears in Hansard, Volume 567, cols. 1493–1583.

Obscene Publications Bill

EXPLANATORY MEMORANDUM

1. The Bill makes changes in both the substance and the language of the law. The common law misdemeanour of obscene libel disappears and is replaced by a new statutory offence.

2. The question of guilty knowledge is declared to be relevant, and the test of obscenity is made dependent upon:

(*a*) the dominant effect of the publication;

(*b*) the literary or other merit of the publication;

(*c*) the class of persons among whom it is intended to circulate.

3. The word "obscene" is extended to cover publications that unduly exploit horror, cruelty and violence.

4. Whereas the common law sets no limit to the punishment for obscene publications, the Bill defines maximum penalties.

5. Further, the Bill amends the law relating to "destruction orders" by magistrates in the following ways:—

(*a*) by introducing the same test of obscenity as that prescribed for criminal offences;

(*b*) by giving the author, publisher, printer and distributor the right to give and call evidence.

6. The destruction of obscene publications by the customs authorities is made dependent on the issue of a destruction order by a magistrate.

7. Provision is made for uniformity in the operation of the law by making all proceedings in England and Wales subject to the consent of the Attorney-General.

ARRANGEMENT OF CLAUSES

Clause
1. Offences under the Act.
2. Definition of obscenity.
3. Penalties.
4. Prohibition of importation of obscene matter.
5. Enactments nullified.
6. Obscene libels.
7. Savings.
8. Initiation of proceedings.
9. Repeals.
10. Short title and extent.

SCHEDULE—Enactments Repealed.

A BILL TO AMEND AND CONSOLIDATE THE LAW RELATING TO OBSCENE PUBLICATIONS

A. D. 1957

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Offences under the Act.

1. Any person who shall wilfully and knowingly distribute, sell, or offer for sale,

or write, draw, print or manufacture for any of the aforesaid purposes, any matter which to his knowledge is obscene within the meaning of this Act, shall be guilty of an offence:

Provided that in any proceedings under this Act, or under the Obscene Publications Act, 1857, a person who wrote, drew or composed, or printed or published the matter in respect of which the proceedings are brought shall be entitled, if he desires, to appear and to be represented in the proceedings and to be heard by the court upon the question whether the matter is obscene.

Definition of obscenity.

2. Any such matter shall be deemed to be obscene for the purposes of this Act, the Obscene Publications Act, 1857, or any other enactment, if

(*a*) its dominant effect is such as to be reasonably likely to deprave and corrupt persons to or among whom it was intended, to be distributed, circulated, or offered for sale, or

(*b*) whether or not related to any sexual context, it unduly exploits horror, cruelty, or violence, whether pictorially or otherwise:

Provided that in deciding whether such matter is or is not obscene the court may receive expert evidence as to the literary or artistic merit, or the medical, legal, political, religious, or scientific character or importance of the said matter.

Penalties.

3. Any person who commits any offence against this Act shall be liable on summary conviction to a fine not exceeding one hun-

dred pounds or to imprisonment for a term not exceeding four months, or on conviction on indictment to a fine not exceeding five hundred pounds or to imprisonment for a term not exceeding twelve months.

Prohibition of importation of obscene matter.

4.—(1) The Commissioners of Customs and Excise are hereby empowered to seize and detain any obscene matter which is in course of being imported into or exported from England and Wales.

(2) When any such matter is so seized, the Commissioners of Customs and Excise shall take proceedings under the Obscene Publications Act, 1857, as adapted by sections one and two of this Act, for the order of a court of summary jurisdiction that the matter seized be either destroyed, delivered to the consignee or returned to the person from whom it was seized:

Provided that where such proceedings have not been instituted within a reasonable time, the matter seized shall be returned either to the consignee or to the person from whom it was seized.

Enactments nullified.

5. The provisions of any Act, whether public, general, local, or private, which are in terms identical or substantially identical with any of the provisions of this Act, are hereby declared to be of no effect.

Obscene libels.

6. It is hereby declared that obscene libel shall not be punishable at common law.

Savings.

7. Nothing in this Act shall affect the operation of the Judicial Proceedings (Regulation of Reports) Act, 1926, or the Law of Libel Amendment Act, 1888.

Initiation of proceedings.

8. No proceedings under this Act or under the Obscene Publications Act, 1857, except for the purpose of subsection (1) of section four of this Act, shall be initiated unless by, or with the consent of, the Attorney-General.

Repeals.

9. The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title and extent.

10.—(1) This Act may be cited as the Obscene Publications Act, 1957.

(2) This Act shall not apply to Scotland or to Northern Ireland.

SCHEDULE

ENACTMENTS REPEALED

Session and Chapter	Short Title	Extent of Repeal
5 Geo. 4 c. 83.	Vagrancy Act, 1824.	In section four, the words "every person wilfully exposing to view in any street, road or highway, or public place, or in the window or other part of any shop or other building situate in any street, road, highway, or public place, any obscene print, picture or other indecent exhibition".
10 & 11 Vict. c. 89.	Town Police Clauses Act, 1847.	In section twenty-eight, the words "or publicly offers for sale or distribution or exhibits to public view any profane, indecent, or obscene book, paper, print, drawing, painting or representation".
39 & 40 Vict. c. 36.	Customs Consolidation Act, 1876.	In section forty-two the words "Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles".
15 & 16 Geo. 6. and 1 Eliz. 2 c. 55.	Magistrates' Courts Act, 1952.	Paragraph 16 of the First Schedule.